United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

77-1030

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1030

B P/S

UNITED STATES OF AMERICA

APPELLEE,

- v. -

WAYNE BROWN,

APPELLANT.

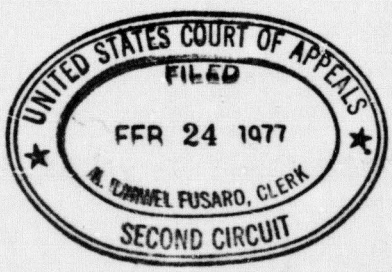
On Appeal from the United States District Court

For the District of Connecticut

Appendix for the Appellant

Daniel H. Kennedy, Jr.
Special Federal Public Defender
10 Ellsworth Road
West Hartford, Connecticut 06107

VOLUME III



PAGINATION AS IN ORIGINAL COPY

(In the absence of the jury:)

THE COURT: I think there is a pending motion in the file in this case for severance of the case of Wayne Brown from that of Arlo Lewis.

I will grant that motion now, so there will be no dispute. But the record reflects what the actual situation is; that is, for all practical purposes it has been severed, anyway.

All right. Call the jury.

MR. SMITH: Your Honor --

THE COURT: Have you got the witness ready?

MR. SMITH: No.

Before the jury comes in, your Honor, we have a witness in the hall. We anticipate that there's going to be a preliminary matter, which the Government would ask that the jury not be present.

THE COURT: This is preliminary time?

MR. SMITH: Yes, it is, your Honor.

The Government anticipates that the witness initially will take the Fifth Amendment, at which time the Government would ask this Court to order immunity. We prepared the necessary papers and we would ask that that not be done in the presence of the jury.

THE COURT: All right. Call your witness in

the absence of the jury.

MR. SMITH: The Government calls Arlo Lewis.

MR. KENNEDY: Well, of course, your Honor, I object to that due to the fact that it's perfectly permissible for me to ask the witness, in front of the jury, whether or not he has been granted immunity in this case.

THE COURT: That's all right. You can ask him.

MR. KENNEDY: I don't see the difference between that and granting him immunity in front of the jury.

In other words, I see no prejudice in front of the jury due to the fact that he is granted immunity in front of the jury to testify.

THE COURT: You don't object?

MR. KENNEDY: As long as I can inquire into whether he has been granted immunity?

THE COURT: Well, you don't object if the whole proceedings - his taking the Fifth, the granting of immunity, and then his testifying; you don't object to that?

MR. KENNEDY: Just one moment, your Honor.

MR. CRAMER: Your Honor, before Mr. Kennedy gets back on, as you know, I'm Attorney Richard Cramer and I have been appointed to represent Mr.

Lewis.

THE COURT: Right.

MR. CRAMER: Until such time as he is immunized, if in fact he is immunized, I would like to be able to stand next to him and advise him on how to answer certain questions which may be incriminating.

THE COURT: Are you dressed for the occasion? All right.

Fine. I think it's very nice.

MR. KENNEDY: The defendant elects -- we'll put him on now in the absence of the jury.

THE COURT: All right.

Take the stand, Mr. Lewis.

A R L O L E W I S, called as a witness, in the absence of the jury, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please speak loudly and clearly. What is your name, Mr. Lewis?

THE WITNESS: Arlo Lewis.

THE CLERK: And your address, Mr. Lewis?

THE WITNESS: 245 Whalley Avenue, New Haven.

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Lewis, do you know the defendant Wayne Brown?

A I refuse to answer on the grounds that it may incriminate me.

Q Were you with Mr. Brown on July 10th, 1976?

A I refuse to answer on the grounds that it may incriminate me.

Q Did you participate in the robbery of the Windsor Branch of United Bank & Trust on July 10th, 1976?

A I refuse to answer on the grounds that it may incriminate me.

MR. SMITH: Your Honor, it might be superfluous to state this, but the record should reflect that he has invoked his Fifth Amendment privilege.

I have here the necessary paperwork and I would respectfully ask that this Court grant an order granting Mr. Lewis immunity pursuant to 18 U.S. Code 6003.

First of all, I have an application for an order instructing the witness to testify. This application has been signed by the U.S. Attorney and it sets forth the questions which I've just asked Mr. Lewis, to which he has interposed his Fifth Amendment privilege.

In support of that application I have my own sworn affidavit, in support of the application.

The final document which I have is a proposed order by the Court conferring immunity. And in support of that order I have --

THE COURT: Permission from?

MR. SMITH: I have permission from John C. Keeney, Acting Assistant Attorney General, pursuant to 28 Code of Federal Regulations, Section 0.133.

THE COURT: All right.

MR. SMITH: In addition to that, I also have a teletype --

THE COURT: Authorization.

MR. SMITH: -- which is attached. The letter came in after the teletype.

THE COURT: All right.

MR. KENNEDY: Your Honor, the objection I made previously to going into this would still stand.

THE COURT: Mr. Lewis, the Court has just signed an order that you give testimony and provide other information which you have refused to give on the basis of your privilege against self incrimination and as to all matters about which you may be questioned in this proceeding.

The effect of that order is that no testimony

or other information that is compelled under this order, or any information directly or indirectly derived from that testimony, may be used against you in any criminal case, except a prosecution for perjury. That is, if you do lie in the answers you give.

Do you understand that?

THE WITNESS: Yes.

THE COURT: All right.

Now we will call the jury.

(In the presence of the jury:)

THE COURT: The witness on the stand is Mr. Arlo Lewis and he has been sworn.

DIRECT EXAMINATION

BY MR. SMITH:

Q How old are you, Mr. Lewis?

A Twenty-four.

Q And where were you born?

A Hartford, Connecticut.

Q How long have you lived in Hartford?

A All my life.

Q Did you go to school here?

A Yes.

Q Whereabouts did you go to school?

A Northwest Jones.

Q Mr. Lewis, I'm going to ask you to try your best to speak as loudly as you can, so everyone in the jury and everyone in the courtroom can hear you.

Did you graduate from Northwest Jones School?

A No.

Q How far through school have you been?

A Seventh grade.

Q Are you employed?

A No.

Q What was the last job that you had?

A Machinist at Metal Improvement.

Q You ran a machine there?

A Yes.

Q When did you have this job?

A Last October.

Q About how long did you hold the job?

A About a few weeks.

Q Why did you leave?

A I was laid off.

Q Are you a heroin addict?

A Yes.

Q How long have you been addicted to heroin?

A Since I was thirteen.

Q That's eleven years?

A Yes.

Q When was the last time you had heroin?

A Around July 15th.

Q So you're not under the influence of heroin right now?

A No.

Q Are you under the influence of any drug at all right now?

A No.

Q So you understand everything that's going on; you understand everything that I'm saying to you and you under-

stand everything that you're testifying to?

A Yes.

Q When you were using heroin, Mr. Lewis, how many bags of heroin a day were you using?

A Between ten-fifteen bags a day.

Q And how much did this cost you?

A Anywhere between fifty to a hundred fifty dollars.

Q Between fifty to a hundred fifty dollars?

A Yes.

Q Why the discrepancy?

A Depended on where I got it at.

Q It was cheaper in some places than in others?

A Yes.

Q Where was it cheaper?

A In New York.

Q It's a hundred fifty dollars a day up here?

A Yes.

Q How did you get the money to support your heroin habit?

A I stole it.

Q How did you steal it?

A Shoplifted, did burglaries - things of that nature.

Q Committed larceny?

A Yes.

Q And you've been convicted of crimes involving stealing

and larceny, correct?

A Yes.

Q And you were convicted of larceny in November of 1972?

A Yes.

Q And you were convicted again of second degree larceny in April of 1973, correct?

A Yes.

Q Then again in October of 1975 you were convicted of larceny again, correct?

A Yes.

Q And recently did you plead guilty to larceny charges in state court?

A Yes.

Q You received a sentence for those charges?

A Yes.

Q So it's fair to say that you have a substantial criminal record?

A Yes.

Q And it's your testimony that your commission of these crimes was related to your use of heroin and your heroin addiction?

A Directly.

Q Do you know a man named Wayne Brown?

A Yes, I do.

Q Do you see him in court today?

A Yes.

Q Would you point him out, please?

A Right there (indicating).

Q The gentleman wearing the black and white checked shirt?

A Yes.

MR. SMITH: Your Honor, may the record reflect the witness has pointed out the defendant?

THE COURT: The record may so reflect.

BY MR. SMITH:

Q How long have you known Mr. Brown?

A For about six, seven years.

Q How well did you know him during this six or seven year period?

A Not very well.

Q Did there come a time during this period where you got to know him better than you had previously known him?

A Yes.

Q About when was that?

A Around May, June. Around June.

Q May or June of 1976?

A Yes.

Q Is that correct?

A Yes.

Q Directing your attention, Mr. Lewis, to the morning of July 10th, 1976, did you participate in the commission of another crime on that day?

A Yes.

Q And what crime was it that you participated in?

A Bank robbery.

Q What bank did you participate in the robbery of?

A United Bank & Trust, Windsor, Connecticut.

Q Was that bank located in a shopping center?

A Yes.

Q Whereabouts in the shopping center?

A The last building on the end.

Q It was an end building.

How many other people participated in that robbery?

A One.

Q And who was that other person?

A Wayne Brown.

Q And you're referring to the same Wayne Brown whom you've previously pointed out?

A Yes.

Q Are you sure about that?

A Yes.

Q Now, you've been charged with participating in that robbery, have you not?

A Yes.

Q And those charges are presently pending against you, correct?

A Yes.

Q What has the Government agreed to do for you in return for your cooperation, your testimony here today?

A To lessen my charge.

Q In what way?

A Reduce it from what it is to a lower crime.

Q Do you know what that lower crime is?

A Not by name, no.

Q Possession of bank money?

A Yes.

Q Stolen bank money; is that right?

A Yes.

Q Is it fair to state that the Government has said you could plead guilty to that charge, rather than bank robbery itself?

A Yes.

Q Has anyone from the Government promised you or told you that you're going to get any type of sentence at all?

A No.

Q Anybody ever predicted that it's going to go easy for you?

A No.

Q You're just hoping for the best?

A Right.

Q Who's the Judge who is going to sentence you?

A Judge Clarie.

THE COURT: Who?

THE WITNESS: I mean Blumenfeld.

THE COURT: Me?

THE WITNESS: Yes.

Q The Judge in this court?

THE COURT: My case?

MR. SMITH: Yes, your Honor.

Q Now, you and I had a conversation this morning with respect to your testimony here this afternoon, correct?

A Yes.

Q Who else was present during that conversation?

A My attorney, Mr. Cramer.

Q Is Mr. Cramer here in court today?

A Yes, he is.

Q Does he know you're testifying?

A Yes, he does.

Q He advised you to testify?

A Yes.

Q All right. Now, did I, or anyone else, during the course of that conversation tell you what to say?

A No.

Q Did I say anything during the course of that conver-

sation about the truth?

A You expressed that I should tell the truth.

Q Did I indicate what would happen if you did not tell the truth?

A That I'd be subject to a perjury charge.

Q Now, do you know what it means when a person has immunity?

A Yes.

Q Are you testifying right now under a grant of immunity?

A Yes.

Q You understand that that simply means that nothing which you say here can be used against you in a prosecution?

A Yes.

Q But that if you tell a lie you can and will be prosecuted for perjury. Do you understand that?

A Yes.

Q That was explained to you?

Okay. Now, Mr. Lewis, I want you to tell the members of the jury, keeping your voice up, everything that happened on the morning of July 10th, 1976; and I want you to take it from the time that you got up in the morning and tell us exactly what happened.

A Wayne Brown came over to my house. I been waiting around, thinking of a way that I can get some money that day.

And he came over.

So I suggested since he had a car, that we go out, you know, do a little boosting or something.

We left my house. We went over to his house, where we got some extra clothes. Put the clothes into a briefcase. We waited around for a while, rapped. Then we got into the car and we left.

We ended up in Windsor, the shopping mall. Right? So I thought that I decided I was going to do a little boosting out at the shopping mall there.

We parked the car in the back of the shopping mall, around the end where the bank was at. We got out of the car and we came around the side of the building, along the front of the bank. Wayne said he wanted to go into the bank and take a look at it. I told him let's go and do the boosting; you know, leave that alone. He said he wanted to take a look at the bank, anyway. So I said, "All right, come on, let's take a look at it."

We walked into the bank. Wayne was walking ahead of me. He walked to the back of the bank, and pulled a gun out, and he said, "Freeze," or "Hold it," or something to that effect. I didn't really quite hear it. I heard it, but I can't remember what it was. The whole situation had me too, too nervous.

So what happened was I walked up behind him, and I

froze for a few minutes, you know, trying to understand just what I was supposed to do, you know.

I jumped over the end of the counter, and he gave me a briefcase. I walked down the end of the counter to the last drawer where the money was at, put the money in the briefcase. I checked a couple of drawers on the tellers' line, see if there was any money in them. There wasn't.

So I came back down to the end of the teller line, jumped back over the counter, then I left. Wayne left behind me.

Q How long did this whole incident in the bank last?

A About a minute and a half-two minutes.

Q Do you remember if you said anything during the course of this robbery?

A No, I didn't.

Q Do you remember if Mr. Brown said anything?

A No, I can't.

Q Would you describe your emotions during this incident? How did you feel?

A I was scared. I was, like, shocked in the way I was scared. Real nervous, very nervous.

Q Okay. Now, you said that Mr. Brown came over to your house in a car. What kind of car was it?

A Green Camaro.

Q You drove from your house to Mr. Brown's house?

A Yes.

Q You obtained some clothing there?

A Yes.

Q You were wearing clothing?

A Yes.

Q But you obtained some extra clothing for yourself?

A Yes.

THE COURT: Why? What was that for?

THE WITNESS: I usually -- like when I go out boosting, I usually like to bring another set of clothes. In case I decide to go back into the same store, I don't want to be wearing the same things that I had on.

THE COURT: When you say "boosting," what are you talking about? Shoplifting?

THE WITNESS: Shoplifting, yes.

BY MR. SMITH:

Q So you drove from Mr. Brown's house to the shopping center?

A Yes.

Q Do you remember where, if anywhere, you went between the time you left Mr. Brown's house and the time you got to the shopping center?

A Not really. Just drove around.

Q Who drove the car?

A Wayne did.

Q Now, you pulled into the back of the shopping center?

A Yes.

Q And you parked behind the bank?

A Yes.

Q Do you remember if you parked facing in or facing out?

A I can't remember.

Q Do you remember if you saw a dumpster near the car?

A I believe there was one back there.

Q Did you or Mr. Brown, or either of you, have a briefcase with you at the time you entered the bank?

A Yes.

Q And can you describe that briefcase?

A It was black. Leather black briefcase.

Q Showing you Government Exhibit No. 12, I ask you if you recognize this briefcase?

A Yes.

Q What is it about that briefcase you recognize, and why do you recognize it?

A I remember this briefcase because of the double handles right here and the fact that this part right here was open right here (indicating) and this side.

Q Did one of you walk into the bank with that briefcase?

A Yes.

Q Which one of you walked into the bank with it?

A I believe it was Wayne.

Q Was the money put into this?

A Yes, it was.

Q And who put it into the briefcase?

A I did.

Q Did you carry this briefcase out of the bank?

A Yes.

Q Did you look inside the briefcase at all? Anything in particular about this that strikes you, strikes your recollection?

A It was this right here. I don't know whether that was ripped or what, because it's different from this. I thought this was supposed to be the real open side.

Q You noticed the kind of double pouches?

A Yes.

Q Now, you testified that after the robbery you and Brown walked out of the bank?

A Yes.

Q Who walked out first?

A I did.

Q And Brown followed shortly thereafter?

A Yes.

Q How much behind you was Mr. Brown?

A I can't really say. I didn't turn around and look.

Q Then what did you do?

A We went around back of the bank and got into the car.

Q As you were going around to get back to the car did you see anyone, see any cars?

A I don't remember.

Q So what happened then once you got in the car?

A We got in the car. We drove up like a little hill in back.

THE COURT: You drove where?

THE WITNESS: Up like a little hill.

THE COURT: Up a little hill?

THE WITNESS: Yes.

A (Continuing) And across it there was like across the street and down another, like, a driveway. And there was a guard there. And he stopped the car. He asked us some questions about something. I can't remember what it was about.

Anyway, we ended up driving past him, down the side of a big parking lot where other cars, a lot of cars parked down there.

So we drove around for a minute, you know, and I seen the only way out was the driveway we had came down in. So I said that it wouldn't be right for us to go right back

by that guard again, you know, after what we had just did back there; you know, the bank robbery. So I says leave the car here.

So we brought the car around to the back, where the factory was at, and left it there. We got out the car and ran across a field and into some woods, wooded area.

In the wooded area we started changing our clothes. I started taking off my clothes, putting on the clothes that was in the briefcase.

BY THE COURT:

Q You had some clothes in a briefcase?

A There was another briefcase with some clothes in it. The clothes that we had brought from the house.

Q The clothes that you had brought from the house you had in a briefcase

A Yes.

Q You had a briefcase with clothes in it?

A Yes.

Q What about Wayne Brown?

A He had the briefcase with the money.

Q A different briefcase?

A Yes.

Q Well, you say a briefcase with the money?

A Yes.

Q Is that what you said?

A There were two different briefcases. One briefcase was the one we had picked up at the house. I had the clothes in it, the extra set of clothes.

Q Clothes for both of you in that same briefcase?

A Yes.

THE COURT: All right.

BY MR. SMITH:

Q This briefcase with the clothes was not taken into the bank, was it?

A No.

Q Who, if you remember, carried the briefcase with the clothes from the car into the woods?

A I believe it was me.

Q Okay. And Mr. Brown carried the other briefcase with the money?

A Yes.

Q I'm showing you a photograph which is Government Exhibit No. 25(a). I ask you if you recognize what is depicted in that photograph?

A Looks like the same car that we used.

Q Does that look like the area where you parked it that day?

A Behind it, the factory, yes.

Q Showing you another photograph, Government Exhibit 25(b), do you recognize what is depicted in that photograph?

A The same car.

Q Finally, I show you a photograph, Government Exhibit No. 25(c).

A Yes.

Q Is that the car?

A Yes.

Q That you used that day?

A Yes.

Q And Wayne Brown drove that car and parked it right where it is?

A Yes.

Q That was after what?

A After the bank robbery.

MR. SMITH: Your Honor, may I show these to the jury?

THE COURT: Yes.

BY MR. SMITH:

Q So you changed clothes in the woods. What happened, what conversation took place in the woods?

A Very little conversation. I was still pretty shook up behind the whole thing. We changed. We got to the woods. I started pulling clothes out of the bag to change into and I told Wayne this ain't the place to split that money up, you know, it would take too much time. You know, I wanted to get away from there, you know, as quick as possible. You

know. So he said he would meet me back at my house, you know.

After I got fully changed in clothes, you know, I left the woods. I left him and kept walking through the woods.

Q So you didn't leave the woods separately?

A No.

Q I mean you didn't leave together; you did leave separately?

A Yes.

Q And the only discussion was that he would meet you back at your house?

A Yes.

Q Did Mr. Brown ultimately meet you back at your house with the money?

A No.

Q Now, showing you a photograph which is marked Government Exhibit No. 27, I ask you to look at that. Were you there this day? Do you recognize what is depicted in that photograph?

A Yes.

Q What is depicted in the photograph?

A The bank robbery.

Q Directing your attention to a man who's wearing a hat and sunglasses, --

A Yes.

Q -- do you know who that man is?

A Yes.

Q Who is that man?

A Wayne Brown.

BY THE COURT:

Q What kind of a hat was it?

A Dungaree hat.

Q A dungaree hat?

A Yes.

Q What color?

A Blue.

Q Blue? What about the glasses, do you know -- you say he was wearing glasses?

A Yes.

Q What kind of glasses?

A They were sunglasses; large frame sunglasses.

Q Sunglasses. How about the gun. There was a gun that he had in his hand during the robbery?

A Yes.

Q Did you see where that came from?

A No. I think it must have came out of the briefcase.

Q Out of the briefcase. You think it must have?

A Yes.

Q Did you see it before you went into the bank?

A No.

Q Had you ever seen the gun before?

A No.

Q And after the robbery, when you got into the woods, until you got into the woods, did you see the gun again?

A No, I don't think I did.

Q So when you left the woods you left him there?

A Yes.

Q And all the clothes?

A Yes.

Q And did you take a briefcase with you?

A I didn't have nothing to put in it.

Q What?

A I didn't have anything to put in, no.

Q That is, the clothes that were left there were all his clothes?

A Yes.

Q Well, you had taken off clothes that you had worn that morning. Weren't they your own clothes?

A No. His.

Q You mean when you got dressed in Hartford, before you went to Windsor, you dressed up in his clothes?

A Yes.

Q What did you do with your own then, put your own in the bag?

A In the briefcase.

Q I see. And you had planned to change clothes after

you did some boosting?

A Well, if it had came in, if it were necessary for me to. See, what I had on was dungarees, you know, and that doesn't look good when you're going boosting, you know. So I wanted to change into a better -- you know, something that looked more, you know, presentable.

Q So when you left the woods you were wearing dunagrees again?

A Yes.

Q Is that right?

A Yes.

THE COURT: Okay.

BY MR. SMITH:

Q Showing you another photograph which is marked as Government Exhibit 30, photograph No. 13, No. 14 -- No. 13. Do you see the man whom you previously identified as Wayne Brown in that photograph?

A Yes.

Q Do you see his arm extended out?

A Yes.

Q Can you see from this photograph what is in his hand, or do you know what was in his hand?

A No, I can't tell from this photograph.

Q Showing you Exhibit 30, photograph No. 14, can you tell from that photograph what is in Mr. Brown's hand?

A Yes.

Q What is in Mr. Brown's hand?

A Looks like a pistol.

Q Showing you Government Exhibit 30, which is photograph No. 15, do you see Mr. Brown in that photograph?

A Yes.

Q Do you see that pistol in his hand in that photograph?

A Yes.

Q Did you see the pistol when you were in the bank?

A Yes.

MR. SMITH: May I pass these on, your Honor?

THE COURT: Yes.

Q (By Mr. Smith) I want to show you a hat, Mr. Lewis, which is marked as Government Exhibit 2. Do you recognize this hat?

A Yes.

Q Tell us what that hat is.

A It's the hat Wayne Brown wore that day.

Q Was that hat worn during the robbery?

A Yes.

Q By Mr. Brown?

A Yes.

Q Showing you a pair of pants which is marked Government Exhibit No. 15, do you recognize these pants?

A Yes.

Q How is it you recognize these pants?

A Those are the pants that Wayne wore.

THE COURT: When?

THE WITNESS: The day of the bank robbery.

THE COURT: During the robbery?

THE WITNESS: During the robbery.

Q (By Mr. Smith) Showing you a tie which is marked as Government Exhibit 13, do you recognize this tie?

A Yes.

Q How do you recognize the tie?

A By the print.

Q Okay. Did you ever see Mr. Brown wearing that tie?

A Yes.

Q Was this tie worn during the bank robbery?

A Yes.

Q By whom?

A Wayne.

Q Showing you a shirt which is marked as Government Exhibit No. 14, do you recognize this shirt?

A Yes.

Q How do you recognize the shirt?

A The print, the color.

Q Did you ever wear that shirt?

A Yes.

Q When did you wear the shirt?

A The day of the bank robbery.

Q Showing you a tie which is marked as Government Exhibit No. 3, have you ever worn this tie?

A Yes.

Q When have you worn this tie?

A The day of the bank robbery.

Q Is this your tie?

A No.

Q Whose tie is it?

A Wayne's.

Q Showing you a pair of sunglasses marked as Government Exhibit No. 1, do you recognize these sunglasses?

A They may have been the ones that he wore that day.

Q You're not sure?

A No.

Q Okay. Showing you a pair of pants marked as Government Exhibit No. 16, do you recognize these pants?

A Yes.

Q Were these worn during the robbery?

A Yes.

Q By whom?

A Me.

Q Are these your pants?

A Yes.

Q And showing you a shirt marked as Government Exhibit No. 20, have you ever seen this shirt before?

A Yes.

Q You have?

A Yes.

Q Was this worn during the robbery or on the day of the robbery?

A I believe so.

Q Do you know by whom?

A Wayne.

Q Showing you a plastic bag, Government Exhibit No. 8, which is an orange bag that says "Tuesday's," did you ever see this bag before?

A Yes.

Q Did you ever have that bag in your possession?

A Yes.

Q When did you have it in your possession?

A The day of the bank robbery.

Q Showing you an exhibit marked Government Exhibit No. 21, I ask you do you recognize this gun?

A Yes.

Q First of all, let me ask: You saw the gun which Wayne Brown held on the day of the robbery?

A Yes.

Q Can you describe that gun for us?

A It looks just like that one.

Q Looked just like this one?

A Yes.

Q Is there anything about this gun that is dissimilar or unlike the gun that Wayne Brown had during that robbery?

A No, not really.

Q Do you know whether this is the same gun?

A I can't say whether that's the same gun.

Q Does it look like the same gun?

A Yes.

Q The gun which he had was similar?

A Yes.

Q Now, when was the first time that you discussed a bank robbery with Wayne Brown?

A The day before the bank robbery.

Q You were with Mr. Brown that day?

A Yes.

Q Whereabouts were you with Mr. Brown?

A Where were we?

Q Yes.

A In the car.

Q Whereabouts? What were you doing?

Let me ask that differently. Were you in any banks on the day prior to the robbery?

A Yes.

Q Do you know whether you were in this bank, the bank that was robbed?

A I'm not sure.

Q Pardon me?

A I'm not really sure.

Q Might you have been in the Windsor Branch of the United Bank & Trust on Friday evening?

A I might have been.

Q Did you have a discussion with Wayne Brown about a bank robbery on Friday?

A Yes.

Q What was that discussion that you had? Tell us what you said, tell us what he said.

A Well, I wanted to do some boosting that day. And he said why don't we go ahead and get some real money; you know, do a bank robbery. I said no, no bank robbery. I wasn't ready for nothing like that, you know.

So he said that, you know, it beats getting, you know, the type of money that I was getting, you know. Because it wouldn't amount to nothing. I was just barely getting over with it.

And I told him I'd stick with it, you know, because it was sufficient, you know.

So he said, well, let's just look at a few of them, you know.

So I said I'm not going to go down with no bank robbery. So he said let's just look at a few. So I said okay, we'll look at them.

Then we went to a few banks. I can't exactly remember which ones. My heart wasn't into it.

MR. SMITH: May I have just a moment please, your Honor.

Q I want to show you another briefcase which is marked as Government Exhibit No. 11. Do you recall seeing this briefcase before?

A I may have.

Q Where do you think you might have seen this before?

A Maybe with Wayne, when I was with Wayne sometime. That's the only time I came in contact with briefcases.

Q I just want to refer you again to this orange bag, Government Exhibit No. 8, Whose bag was this, if you know? Do you recall?

A I believe it might have been my bag.

Q You're not sure, or you are sure?

A I'm not really sure. I'm pretty sure it might have been mine.

MR. SMITH: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. KENNEDY:

Q Mr. Lewis, you want us to believe that this bank

robbery was Wayne Brown's idea; you didn't know anything about the gun until you saw it taken out in the bank, and that all the clothes you used in the robbery, except for this one pair of pants marked Government Exhibit 16, belonged to Wayne Brown, is that right?

MR. SMITH: Your Honor, I object to the form of the question.

THE COURT: Yes. Sustained.

There are five or six different questions there. Ask him one at a time.

Q (By Mr. Kennedy) You want us to believe it's Mr. Brown's --

MR. SMITH: I object, your Honor.

THE COURT: What's that?

MR. SMITH: I object to counsel asking what the witness wants us to believe.

What he wants us to believe, I think, is irrelevant. I think the facts are relevant.

MR. KENNEDY: Well, I think I can ask that question in cross-examination.

THE COURT: You may ask it.

BY MR. KENNEDY:

Q You want us to believe that the robbery was Mr. Brown's idea, is that right?

A Yes.

Q And you also want us to believe that all the clothing, with the exception of that pair of pants I just showed you, Government Exhibit 21 -- excuse me -- Government Exhibit 16, belonged to Wayne Brown?

And you also are telling us that Wayne Brown drove his car up there, you were a passenger in the car, and he abandoned the car a quarter of a mile from the bank; is that right?

A Yes.

Q Now, you're telling us you had never noticed Wayne Brown's gun -- and it was Wayne Brown's gun, is that right?

A Yes.

Q You never noticed the gun until you got into the bank and he pulled the gun out, is that right?

A Yes.

Q Furthermore, you want us to believe that you don't remember, at least you don't remember today having been in that bank before on the Friday before, the Thursday before, or any other time? And it was kind of a spur of the moment thing? You went up to the shopping mall, you were going to do some boosting; is that what you said?

A Yes.

Q But instead of doing some boosting, Wayne directed you into the bank, and you went into the bank and followed him in?

A Yes.

Q And you went up to the shopping mall and you weren't really sure that you were going to rob that bank; it was a kind of spur of the moment thing, is that right?

A Yes.

Q Now, I'm showing the witness a statement he made on July 17th, 1976, to Special Agent David W. Miller and Murray a Killan, and I'm asking him to read from Page -- the pages are numbered. This is the second page of the statement. The number at the bottom of the page is 94.

I want you to read this right here. (Pause)

Now, does it say in the statement --

A I didn't finish reading it.

Q Right here (indicating).

(Pause)

Now, does it or does it not say in that statement, Mr. Lewis, that you entered that bank on Friday afternoon?

A It says that, yes.

Q It says that, doesn't it?

A Yes.

Q Now, I'm going to ask you to read the paragraph on the same page, the fourth paragraph on the page, starting right there.

Now, does it or does it not say in that statement that you gave to the FBI on the 17th day of July, that you

knew there was a gun before you went into the bank? Does it say that?

A Yes.

Q Now I want to show you Government Exhibit 27, which is a photograph of a man standing in the bank with a hat on and a gun in his hand. Is that right?

I'm going to ask you does that man in that photograph appear to you to have a mustache?

A I can't really tell from the picture.

Q I show you another photograph, Exhibit 30.

A It's hard to tell. It's hard to tell.

Q But does it look like he has a mustache or not?

A He may have one, he may have not.

Q Did you have a mustache on July 10th, as you do now?

A Yes.

Q How tall are you, Mr. Lewis?

A Five, three.

Q How much do you weigh?

A A hundred and thirty pounds.

Q Do you know how tall Mr. Brown is?

A No.

Q Is he around your size?

A Yes.

Q Do you know how much he weighs?

A No.

Q Does he weigh about what you weigh?

A I don't know. I guess so.

Q Now, is it your testimony that when you got into the bank Wayne Brown says to you, "Put the money in the briefcase," because you really don't know what to do? He's standing in the bank, he hands you a briefcase and he yells at you: "Put the money in the briefcase" - is that what you said?

A I can't remember what I said in the statement.

Q No, not in the statement. This morning, or this afternoon.

A I didn't say that. I didn't say he said that to me this afternoon.

Q What did he say?

A I can't remember everything that was said in the bank.

Q Well, it's my recollection, Mr. Lewis, that you said that before. Now, what did he say when he handed you the briefcase; what did he say, as best you can recollect?

A I can't remember.

Q Did he say something about what to do? "Put the money in there," or something along that line?

A I can't remember.

Q You didn't just testify to that on Direct Examination, that he told you to put the money in the briefcase?

A I don't remember.

Q You don't remember something you testified to five-ten minutes ago?

A I don't believe I said that. I might have said it.

Q Now, what does boosting mean to you?

A Shoplifting.

Q And what you want us to believe is that when you went up to that shopping mall you didn't intend to rob the bank; you intended to shoplift in a store?

A Yes.

Q And when did you first find out you were goingto rob the bank? When Wayne Brown told you that?

A No.

Q So you went along with him?

A What do you mean?

Q All right. What did he say, "Come on, we're going to go in here and rob the bank"?

A No.

Q How did you get in the bank?

A The shopping center where the stores is at is further down the mall.

Q So you get out of the car and you're walking toward a store?

A We're walking, getting ready to go down there.

Q Yes?

A And we was going by the bank. He says, "Look it here, let's check this out."

Q He says just "Let's check it out." He doesn't tell you "We're going to rob the bank"?

A No.

Q So you go inside and all of a sudden, first thing you know, he throws a briefcase at you?

He's carrying the briefcase, is that right?

A I believe he was.

Q Well, you testified this afternoon that he was, right?

A I believe he was carrying the briefcase.

Q And you also testified that he was carrying a gun that you found out about after you got in the bank. You weren't carrying the gun?

A No.

Q Then what does he do? He hands the briefcase to you?

A Well, we first walked in the door. Wayne was walking ahead of me.

He walked directly to the bank of the bank and took out a gun and says: "Fold up," or "Freeze," or something like that. I can't remember the words.

But I remember walking up behind him. And I remember freezing for a few minutes and trying to get a grip on

the situation. After that, I jumped over the counter.

Q And did he tell you to jump over the counter?

A No.

Q You just knew instinctively what to do, is that right?

Now, despite the fact that you had talked about a robbery, your testimony is you talked about a robbery with Wayne Brown the day before, and you had actually gone into a few banks the day before, and you admit that the statement here is that you actually walked into the bank you robbed on Friday night.

You're telling me today that you had no idea that that was a robbery. You walked in and you were just surprised. Wayne Brown says -- he pulls out the gun and says, "Everybody down on the floor. Stick your hands up," or something, and then you know it's a robbery. That's the first time you knew?

THE COURT: Answer, please.

A Yes.

THE COURT: All right.

Q (By Mr. Kennedy) Have you been to Wayne Brown's apartment a few times prior to this robbery?

A Yes.

Q So you know where it is?

A Yes.

Q Have you been in his car prior to this robbery?

A Yes.

Q You know he parks his car near his apartment building?

A Yes.

Q As a matter of fact, you know just where he parks his car, don't you?

A He might park it different places at different times.

Q Well, you know in the general area where he parks his car, isn't that right?

A Somewhere around his house.

Q So what you want us to believe now is that after the robbery occurred Wayne Brown leaves his car a quarter of a mile from the bank, he says to you "I'll meet you back at your house; I'm taking the money." You don't say anything; you just change your clothes and take off without the money, without Wayne, and you're going to meet him back at his house, is that right?

A I had agreed to it that I would meet him at my house after the bank robbery.

BY THE COURT:

Q At your house?

A Yes.

Q Where did you live at that time?

A One Ninety -- I think it's 193 Sigourney Street.

Either 191 or 193 Sigourney Street.

Q Is that near Farmington Avenue, or where?

A It's down the street from Farmington Avenue. About a few blocks from Farmington.

Q Three blocks?

A About a few blocks.

Q Toward Ashley, or toward which way? Over toward Asylum Street?

A Wait a minute now. Let me see. Farmington Avenue --

Q Or was it toward the Aetna Insurance Company? Sigourney Street, you say.

A Yes. I'm trying -- you know where Arthur Drug Store is at?

Q Yes.

A Well, it's right there. It's on the corner of Sigourney.

Q I see. That's Sigourney and Farmington Avenue?

A Yes.

Q And Wayne Brown lived where? Clinton Street?

A I don't know the name of the street. I know where it's at, but I don't know the name of it.

Q Near the Bushnell Memorial?

A Yes.

THE COURT: All right.

BY MR. KENNEDY:

Q You live on Sigourney Street, is that right?

A That's where I was staying at the time.

Q Do you know a Willie Wright who lives on Sigourney Street?

A No.

Q You don't know him?

A No.

Q Now, the United States Attorney showed you Government Exhibit 21, which is a hand gun. And you looked at that exhibit and you said it looks like the gun that was used in the robbery, is that right?

A Yes.

Q Furthermore, you said that it looked very similar - I believe that was the words. Is that a fair statement of what you said?

A Yes.

Q And you proceeded to give a partial description of that gun. Now, let me ask you this, Mr. Lewis. Is the reason why you were able to partially describe what the gun looked like because it was right in front of you when you were asked to describe it? If that gun hadn't been shown to you would you have been able to describe that gun?

A I might have, yes. I think so.

Q Okay. I'm showing you a statement you gave on

July 17th and ask you to read that paragraph right there, which is on the second page of the statement, Page 94.

MR. SMITH: Would you indicate what paragraph you are referring to?

MR. KENNEDY: The fourth paragraph on that page.

Q Now, does it say in that statement, or does it not say in that statement, that you did not know what kind of a gun it was?

A I didn't know what caliber gun it was.

Q Well, it doesn't say you didn't know what caliber gun it was, does it?

You have to answer yes or no, Mr. Lewis.

A To what?

Q What I just showed you, does that say you didn't know what kind of caliber gun it was or does it say you didn't know --

A I didn't know what kind of gun it was, it says.

Q What was the reason you decided to go along with either boosting or a robbery with Wayne Brown on July 10th?

A What was the reason I decided to go out boosting with him?

Q Yes. Did you need the money for your heroin habit, was that the reason?

A Partially, yes.

Q What else was the reason? That's all of the reason,

isn't it?

A Partially the reason.

Q Okay. You tell me what else was a contributing factor that led you to commit this crime on July 12th. Why did you need the money?

A I needed money.

Q For what?

A A lot of reasons. I was a drug addict.

Q That's one.

A At the time my mother was in the hospital and my sister was in the hospital.

Q Which was it, your mother or your sister?

A Both of them.

Q What else?

A They was sick, you know. The rent had to be paid and everything, you know. I had to eat, eat every day. And I needed money like everybody else needs money.

Q Before you were told that the Government would like to give you immunity in this case, Mr. Lewis, were you offered any kind of deals by the Government before that time? Did they tell you that they would reduce your crime to possession of stolen bank money, anything along that line?

They didn't, did they?

A If I testified?

Q No. I'll ask you the same question again.

Before the Government told you that they were going to call you as a witness and grant you immunity in this case, were you offered any kind of a more lenient or lesser sentence by the Government?

A No.

Q No. What was the first time you heard anything about a lesser sentence to the crime of possession of stolen --

MR. SMITH: Your Honor, I object to that. That's not the testimony. That's a deliberate misstatement of the testimony.

MR. KENNEDY: I don't know what he means by a deliberate misstatement.

THE COURT: Well, he means he would be allowed to plead to a lesser charge, that is, a charge carrying a lesser maximum sentence.

MR. KENNEDY: Okay. I agree.

THE COURT: Is that right?

THE WITNESS: Yes.

BY MR. KENNEDY:

Q When was the first time you were made aware of the fact that you would be allowed to plead to a lesser charge?

A I'm trying to remember whether it was --

THE COURT: Was it before today?

THE WITNESS: Yes.

THE COURT: Was it yesterday, or before yesterday?

THE WITNESS: I think it was the day before yesterday.

THE COURT: The day before yesterday, you think?

THE WITNESS: I think.

BY MR. KENNEDY:

Q And who told you about that, the Government or your attorney?

A I believe it was my attorney.

Q Now, at the same time you found out about the fact that you may be allowed to plead to a lesser charge, did you also find out about the fact that the Government would grant you immunity?

A At the same time?

Q Well, around that time.

A Yes.

Q And do you know whether or not -- or were you told whether or not possession of stolen bank money is a lesser offense than the one you are now charged with?

A Yes.

Q Is it a lesser offense?

A I was told it was.

Q Or were you told it was?

Pardon?

A I was told it was.

Q Now, upon Mr. Smith's questions you said that you were not promised any particular sentence by the Government, is that right, if you pled to this crime?

A No.

Q The possession of stolen bank money?

A No.

Q You discussed that with your attorney, though, didn't you?

A Yes.

Q That your sentence wouldn't be as great if you pled to possession of stolen bank money?

MR. SMITH: Your Honor, I object.

THE COURT: It's cross-examination. Overruled.

A Would you repeat the question?

Q Were you told that if you were allowed and you did, in fact, plead to possession of stolen bank money, the sentence you would receive would not be as severe as pleading to bank robbery?

A No. It may not be as -- he didn't say definitely.

Q He told you it may not be as --

A He told me the maximum sentence that I could get wouldn't be as great.

Q Wouldn't be as great?

A Yes.

Q Did you discuss with either your attorney or the

Government the fact that -- did you discuss not testifying, or after being granted immunity refusing to testify in this case? Did anyone mention that to you?

A Not testifying?

Q Yes.

THE COURT: After he was granted immunity?

MR. KENNEDY: Yes.

Q If they told you that you didn't, what would happen?

A Oh, they said if I didn't testify that I could be granted -- they would bring me in here and they'd grant me immunity from whatever I said, you know. They said that I didn't have to -- I could, you know, say something about my Fifth Amendment, you know.

But if the Court decided that it wanted me to testify, it could grant me immunity, you know, and that anything that I said after that wouldn't be held against me, wouldn't incriminate me.

Q Considering your state of affairs in your case, Mr. Lewis, do you consider this to be a fairly good deal - being allowed to plead to a lesser offense of possession of stolen bank money?

A Yes.

Q Now, who were you with -- strike that.

Is it fair to say that when you were shown these articles of clothing, the reason you recognized them is because

they're tagged here and they're being shown to you as an exhibit?

You don't recognize each one of these pieces of clothing as something that was worn by either Wayne or you on the day of the crime, do you?

A Yes.

Q You do? You can absolutely say that all these articles were worn by Wayne Brown or yourself on the day of the crime?

A I said I believe they was.

Q Did you illegally enter Wayne Brown's apartment to pick up any of these clothes?

A No.

Q Did you illegally use his car without his permission?

A No.

Q You didn't break into his car?

A No.

Q You didn't break into his apartment?

A No.

MR. KENNEDY: I have nothing further of this man, your Honor.

REDIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Lewis, why did you jump the counter?

A In the bank?

Q Yes.

A I felt -- when I saw the gun and I walked up behind him, everything was so quick, you know, my head was messy; you know, I was just nervous, I didn't know what to do.

I knew that I wasn't going to run out the door. I knew I wasn't going to do nothing like that, you know. I knew he had the gun, you know. So I says, well, I got to be the one to get the money. I know he wasn't going to handle the gun and get the money at the same time.

Q You weren't about to walk out when somebody's got a gun?

A No.

Q Now, when you went into these banks the day before, what did you think that you were going in there for? What was your understanding of the purpose for which you went into these banks on Friday night and again that bank on Saturday?

A He just said he wanted to look at them, see what they looked like.

Q For any particular purpose?

A To rob it, I guess.

Q To case it?

A Yes.

Q Now, do you know what the maximum penalty is for receiving stolen bank money?

A [illegible]n years, I think.

Q That's the charge that you were discussing?

A Yes.

MR. SMITH: Nothing further, your Honor.

RECROSS-EXAMINATION

BY MR. KENNEDY:

Q Have you ever testified before in court, in a criminal case, Mr. Lewis?

A Other than this one?

Q Other than this one.

A No.

Q No?

A I don't think so. I don't remember. I'm pretty sure I didn't, though.

THE COURT: Well, you were convicted on some previous occasions of larceny, right?

THE WITNESS: Yes.

THE COURT: In the state court?

THE WITNESS: Yes.

THE COURT: In those cases did you plead guilty?

THE WITNESS: Yes.

THE COURT: Were any of them trials?

THE WITNESS: No.

THE COURT: You pleaded guilty every time?

THE WITNESS: Yes.

THE COURT: All right. You didn't have to testify, then?

THE WITNESS: No.

BY MR. KENNEDY:

Q You never testified for anyone - yourself or anyone else - in a courtroom?

A No.

Q Did you ever tell a lie in a serious matter?

A What do you mean "serious matter"?

Q That's a good question.

THE COURT: Yes.

Q Did you ever tell a lie in anything other than a white lie you may tell to someone without thinking twice about it? Did you ever tell a lie about something serious?

MR. SMITH: Your Honor, I object to that.

THE COURT: Sustained.

If you have specific instances you want to inquire into, we might allow it.

Anything further, Mr. Kennedy?

Q (By Mr. Kennedy) Can you think of any particular reason, Mr. Lewis, why you would come into this courtroom and say Wayne Brown was with you on July 10th, 1976, if he was not? Can you think of any reason, any prior dealings with him? Any reason you can think of why you would have it in for Wayne Brown?

A No.

Q Nothing you can tell us?

A No.

MR. KENNEDY: I have nothing further, your Honor.

MR. SMITH: Nothing further, your Honor.

THE COURT: We will suspend at this point until tomorrow morning at ten o'clock.

I caution you again not to talk to anyone about the case, nor permit anyone to talk to you about it.

We will adjourn court till tomorrow morning at ten o'clock.

(Whereupon, court was adjourned.)

(In the absence of the jury:)

THE COURT: All right. Ready?

MR. DABROWSKI: The Government is ready, your Honor.

THE COURT: All right.

Will we finish today?

MR. KENNEDY: Yes, your Honor.

THE COURT: The Charge and arguments, as well?

MR. KENNEDY: I believe so.

THE COURT: All right.

Did you submit anything by way of requests?

MR. KENNEDY: Yes, I have.

THE COURT: Okay. Call the jury.

MR. KENNEDY: Your Honor, before the jury is called, I believe Mr. Dabrowski has one final witness, and that's a Clifford Barry, in his case in chief. And if that is true, I would like to have him make a parol offer of what evidence Mr. Barry is going to submit to the Court. And if it is what I think it is, I would like to be heard on the admissibility of it in the absence of the jury.

THE COURT: What is this all about?

MR. DABROWSKI: Your Honor, there may be two additional witnesses.

I'm definitely calling Mr. Barry. Whether I

call another witness after Mr. Barry will be contingent upon what happens when Mr. Barry testifies.

However, at this point I'm definitely going to call Mr. Barry. What the Government intends to do through Mr. Barry is to establish that on July 12th, 1976, Mr. Barry had occasion to see the defendant in this case, Wayne Brown, in New York City. He also had occasion to have a conversation with him and during that conversation Mr. Brown identified him to himself and Mr. Brown said that his name was Willie Wright.

He used a false name incident to boarding an aircraft. In addition, Mr. Brown was boarding an aircraft ticketed under the name of Willie Wright.

Now, in addition to that, Mr. Barry will testify that he's aware of the amount of money that Mr. Brown had on him on that date and, specifically, that that amount is $503.

In addition to that, he will testify that Mr. Brown, known on that date to him as Mr. Wright, had with him at that time a briefcase. Mr. Barry will then be asked if he knows what's in the briefcase. He will answer yes.

And if allowed to answer the question what was

in the briefcase, he will identify the gun, which I believe is Government Exhibit 21, as being a weapon loaded at that time, which he discovered in a briefcase on July 12th at LaGuardia Airport.

THE COURT: All right.

MR. KENNEDY: Now, the gun is a Government exhibit for identification.

THE COURT: So far.

MR. KENNEDY: So far.

First of all, I think the Court has to make a determination of whether any evidence as to the gun, as to the money, etc., would be relevant in the case. And if the Court comes to that determination, which I would imagine that the Court would, it then has to come into a determination of whether under Rule 403 this evidence of probative weight outweighs any unfair prejudice toward the defendant.

Now, I will say this about the evidence. This man was arrested in New York City. Clifford Barry will be identified as a police officer from New York City. The arrest has nothing to do with this offense. The gun has not been tied into this offense at all. The money taken in New York City, according to the Government's information to me,

does not match any of the serial numbers of the money taken from Windsor. It's entirely different.

Even testimony from Clifford Barry about the gun would be excludable. And the defendant cites for that proposition a Second Circuit case decided November 1st; that is, United States vs. Cecil Robinson. And in United States vs. Cecil Robinson --

THE COURT: I've read the opinion.

MR. KENNEDY: Well, the facts are fairly close to the facts in this case. There's no eye witness identification so far in this case. The movies that were shown --

THE COURT: What do you mean there's no eye witness identification?

MR. KENNEDY: Pardon?

THE COURT: Of what? Of whom?

Arlo Lewis put the finger on him. He was there with him.

MR. KENNEDY: Arlo Lewis -- okay. I grant you an accomplice.

There's no eye witness identification from anyone in the bank; no eye witness identification from any customers, anyone around the bank on that day.

THE COURT: Well, there is other evidence that

he looks like the man who was there, and they have the clothes that were abandoned in the woods that belonged to him.

MR. KENNEDY: Yes.

There was other evidence in the Cecil Robinson case also, your Honor.

THE COURT: What was it?

MR. KENNEDY: Well, in the Cecil Robinson case there were movies and people had said that the man in the movies, it was very difficult to tell, but he looked similar to the defendant.

THE COURT: That's right.

Well, we have that here.

MR. KENNEDY: We have that.

THE COURT: But we have more here; a lot more.

MR. KENNEDY: Well, we have an accomplice here.

THE COURT: We have someone who said he was there, yes. We have his clothes being abandoned at a place where the accomplice says they were abandoned and where they were found, and no doubt that they were his, and they found fruits of the crime at that site - the bands that were around the money that was stolen.

MR. KENNEDY: Again, your Honor, the only evidence that the clothing belonged to Mr. Brown

was from the accomplice. The other people in general part were not sure.

THE COURT: He had his laundry tag in one pair of pants.

MR. KENNEDY: In one pair of pants was the laundry tag.

In the Cecil Robinson case --

THE COURT: And the laundry tag was identified as on pants that were brought in for cleaning by Mr. Brown.

MR. KENNEDY: I agree.

But in the Robinson case there was an accomplice and the accomplice testified, and the accomplice put the finger on --

THE COURT: I'm sorry. I'm inclined, at this point, to deny an objection to the admissibility of the gun if it is offered. That's what you wanted to know.

MR. KENNEDY: Not only that, your Honor, but I'm objecting to any testimony from the officer about the gun. I'm objecting to any introduction into evidence of $500, which is not the same in serial numbers as the money taken in the bank.

THE COURT: I don't know that the money will be introduced.

MR. KENNEDY: Well, even testimony of it.

THE COURT: But there is the evidence that this man didn't have enough money to pay his bills and that he was short of money just shortly before this. He couldn't pay his rent.

THE DEFENDANT: Excuse me. Could I see my attorney, please?

THE COURT: What's that? You want to talk to your lawyer?

MR. KENNEDY: There was evidence from the landlord that he was a month behind in his rent. I remember that.

I don't remember any other evidence that he --

THE COURT: That he said, yes, that he said he wasn't able to pay his bills, as I recall.

MR. KENNEDY: Well, my objection stands on the ground that the unfair prejudice would come to Mr. Brown for the admissibility of any of that evidence from Clifford Barry.

THE COURT. Well, you know, if you are caught with evidence that's harmful, that's unfair, you might say, and prejudicial. But that doesn't mean it is objectionable.

MR. KENNEDY: I think it is objectionable, your Honor, when it is not tied into this case.

And that gun isn't tied into this case, and the money is not tied into this case.

THE COURT: All right.

Call the jury.

(In the presence of the jury:)

THE COURT: Good morning. Be seated.

All right.

MR. DABROWSKI: The Government calls Clifford Barry.

C L I F F O R D B A R R Y,

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Will you state your name for the Court?

THE WITNESS: Yes. Police Officer Clifford Barry.

THE CLERK: How do you spell your last name, please?

THE WITNESS: B-a-r-r-y.

THE CLERK: And your address, Mr. Barry?

THE WITNESS: LaGuardia Airport, Queens, New York.

DIRECT EXAMINATION

BY MR. DABROWSKI:

Q Mr. Barry, how are you employed?

A I'm employed by the Port Authority of New York and New Jersey.

Q And were you so employed on July 12th of 1976?

A Yes.

Q Just what is the Port Authority?

A It's a bi-state agency. We have an 1100 man police force. We work under federal law, New York law and New Jersey law.

Q Where were you on July 12th, 1976?

A Eastern Airlines security area. Eastern Airlines security area in LaGuardia Airport.

Q At LaGuardia?

A That's right.

Q Now, on July 12th, 1976, while you were at the Eastern Airlines terminal security area at LaGuardia Airport, did you see the defendant in this case, Wayne Brown?

A Yes, I did.

Q Did he have a briefcase with him at the time?

A Yes, he did.

Q Do you know what, if anything, was in that briefcase?

A Yes, sir.

Q What was in the briefcase?

A There was a .38 caliber --

MR. KENNEDY: Objection, your Honor.

I'm going to object to any evidence coming in at this point.

THE COURT: July 12th?

MR. KENNEDY: On July 12th.

THE COURT: At the Port Authority terminal?

THE WITNESS: Yes, LaGuardia Airport, sir.

THE COURT: What?

THE WITNESS: LaGuardia Airport.

MR. KENNEDY: Unless it is something that can

be tied into this case directly, your Honor, I object to it on the grounds of relevancy.

THE COURT: Well, we will find out.

What is the pending question?

(Question read back.)

Q (By Mr. Dabrowski) Did you see what was in the briefcase?

A Yes, sir, I did.

Q What was in the briefcase?

That's the pending question, your Honor.

THE COURT: Objection overruled.

A There was a .38 caliber revolver.

Q Now, didyou actually take that .38 caliber revolver out of that briefcase?

A Yes sir, I did.

Q Showing you Government's Exhibit 21 marked for identification, do you recognize that?

A Yes, sir.

Q What is that?

A That's the gun I took out of the black briefcase.

Q Was the gun loaded at the time?

A Yes, sir.

Q How many shells were in the gun at the time?

A Four.

MR. DABROWSKI: And I notice in this exhibit

here the gun is encased in a wrapper, your Honor.

Q There are only two bullets, is that correct?

A That's right.

Q What happened to the other two bullets?

A During the ballistics test they fired two of them to see if the gun operated and the bullets were, you know, able to be fired.

Q Now, did you have a conversation on that date with Wayne Brown, the defendant in this case?

A Yes sir, I did.

Q During that conversation did he identify himself to you?

A Yes, sir.

Q How did he identify himself?

A As Willie Wright.

Q He said he was Willie Wright?

A That's correct.

Q When is the first time you learned -- do you now know him as Wayne Brown or Willie Wright?

A As far as I know, he's Willie Wright to me.

Q That's because he told you he was Willie Wright and identified himself as Willie Wright on that date?

A That's correct.

Q Now, did you have any conversation about any clothes he had with him?

A Yes. He had a brand new suit with him.

Q What was the substance of that conversation?

A That he had bought it in New York.

Q Do you know how much money he had on him on July 12th, 1976?

A Yes, sir.

MR. KENNEDY: Well, I object. Unless the money can be tied into this robbery, it's immaterial how much money he had on him.

THE COURT: What is your claim?

MR. DABROWSKI: Well, should I make it in front of the jury, your Honor?

THE COURT: I guess so.

MR. DABROWSKI: My claim is that the possession of a large amount of money is directly relevant to this case, in view of the fact that a number of individuals have testified that Mr. Wayne --

THE COURT: Overruled.

BY MR. DABROWSKI:

Q Do you know how much money he had on him on July 12th?

A Yes, sir.

Q Was that money in cash?

A That is correct.

Q How much money did he have on him?

A $503 and change.

Q Had he also purchased a ticket to board an aircraft?

A That's correct.

Q Do you recall what name he was ticketed under?

A I believe it was Willie Wright.

MR. DABROWSKI: Your Honor, the Government moves for the full admission of Government's Exhibit 21 now marked for identification.

MR. KENNEDY: Objection, your Honor.

This man has identified this gun as having been in this defendant's possession in New York. It was after the point of this robbery and there has been no identification in this case that this was the gun that was used in this robbery. He's merely saying that this is the gun that he found on the defendant at some later time in New York City.

What the Government is doing is they are asking the jury to draw an inference that this is the gun that was used in the robbery. This man could have purchased this gun while he was in New York. Someone could have given it to him.

On that ground, I object to it.

THE COURT: Overruled.

The gun is offered as evidence to prove that Wayne Brown, at the time of the robbery, used a gun in the course of committing the robbery.

Now, this was found in his possession very shortly after the robbery took place. There is evidence that he did go to New York following the robbery.

I'm not indicating to you what evidence you should believe or credit, but there is evidence also, from others, that this looks like the gun that he was using at the time, or that was being used at the time of the robbery.

So you may consider whether or not this is the gun that he used.

On the other hand, or in the same connection, the mere fact that he had a gun in his possession, if you are not satisfied that this is the gun that he used, is not to be considered as evidence that he was a bad man because he had a gun in his possession in New York. The only question is whether this was the gun that he had at the time of the robbery.

If you decide it wasn't, then not only is that something you are not going to regard, but

you cannot take it into account and say, well, even if that isn't the gun it shows he's a bad man. Because we are not here to try the case of whether he's a bad man or whether he's done something else that he shouldn't have been doing.

The only case we are concerned with is the case of the bank robbery which occurred on July 10th in the Town of Windsor.

Anything else?

BY THE COURT:

Q Are you an officer of some sort?

A Yes, I am.

Q What sort did you say you were?

A Port Authority police officer, New York and New Jersey.

Q You say that he had a ticket, an airline ticket on Eastern Airlines?

A That's correct.

Q Do you know what the destination was?

A I believe it was South Carolina.

Q Somewhere in South Carolina?

A Yes.

Q Did he continue onto his destination?

A No, sir.

THE COURT: All right.

MR. DABROWSKI: I have nothing further from this witness.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. KENNEDY:

Q The ticket, Mr. Barry - isn't it true that that ticket was under the name of Wayne Brown and not under the name Willie Wright?

A To the best --

Q Well, did you check to see whose name the ticket was in?

A Well, the ticket had nothing to do with what I was involved in.

Q Well, did you check to see --

A I did check the ticket and to the best of my recollection it was Willie Wright.

Q Do you have the ticket with you?

A No, I don't. It was returned to the individual.

Q Did you look at that ticket yourself?

A Yes, I did.

Q And can you tell us today that you saw the name "Willie Wright" on it?

A To the best of my recollection the only name I saw was Willie Wright.

Q Well, can you tell us for certainty?

Q For certainty?

Q Yes.

A I couldn't be positively sure, but to the best of my recollection it was Willie Wright.

Q Did you have a conversation with Mr. Brown about where he got the gun from?

A Vaguely I remember about it.

Q Did he tell you he bought the gun in New York?

A He told me he bought it in New York and has had it for two years.

Q He told you he bought it in New York, but he's had it for two years?

A That's correct.

Q Now, did you at any time check, take a list of the serial numbers on the $500 he had with him?

A Yes, I did.

Q Do you happen to know whether or not those serial numbers match the serial numbers of money taken in this bank robbery?

A None of the numbers match.

Q So that the money you found on Wayne Brown was not any of the funds taken from this bank robbery, as far as you know?

A As far as I know, that's correct.

MR. KENNEDY: I have nothing further, your Honor.

THE COURT: All right. You may step down, Mr. Barry.

(Witness excused.)

MR. DABROWSKI: Your Honor, the Government recalls Detective Overstrom.

E V E R E T T O V E R S T R O M,

recalled as a witness, having been previously duly sworn, was further examined, and testified as follows:

THE CLERK: Previously sworn, your Honor.

THE COURT: You are still under oath, Detective.

THE WITNESS: Yes, your Honor.

DIRECT EXAMINATION

BY MR. DABROWSKI:

Q Detective Overstrom, you are with the Windsor, Connecticut Police Department, is that correct?

A That's correct.

Q Now, did you have occasion to search the residence of Wayne Brown at 9 Clinton Street, Hartford, Connecticut?

A Yes, I did.

Q And was that after July 10th, the date of the bank robbery?

A Yes, it was.

Q Do you recall who was with you at the time you conducted this search?

A No, I don't. I believe Mr. Hawkes was present, the superintendent.

Q Cecil Hawkes?

A Cecil Hawkes.

Q Were there other police officers? I don't mean citizens. Were there other police officers there?

A I can't recall. I know I was there.

Q Now, during the search --

THE COURT: When was this, what date?

THE WITNESS: July 14th.

THE COURT: July 14th. All right.

Q Now, during the search of that residence did you discover anything?

MR. KENNEDY: Objection.

Your Honor, I want to be heard on this in the absence of the jury.

(In the absence of the jury:)

THE COURT: Note that the jury retired.

It's kind of late to challenge the search warrant, isn't it?

MR. KENNEDY: I'm not challenging the search warrant, your Honor.

My ground is this -- as soon as I can find the warrant.

THE COURT: I'm not aware of any motion to suppress.

MR. KENNEDY: There's not a motion to suppress, your Honor. However, I wish to say this to the Court:

This man was an affiant on the search warrant affidavit.

THE COURT: He was what?

MR. KENNEDY: An affiant.

THE COURT: Yes, the affiant. All right.

MR. KENNEDY: He was looking for a shirt, black briefcase, bait money, bank money wrappers, one snub nose revolver, a bright splash flower design --

THE COURT: Yes.

MR. KENNEDY: In his return what he found was none of that. What he found was nothing to do with any contraband in the robbery. What he found was a black gun holster.

THE COURT: A what?

MR. KENNEDY: A black gun holster.

Now, the only possible reason -- there has been no connection in the robbery with this. The testimony has been the man took the gun out of the briefcase. He didn't take it out of a holster. The holster has never come up in any testimony and like the testimony from Officer Barry, the only possible reason for this is to inflame the jury so the average juror would draw the inference that one who has a holster must have a gun at the time of the robbery.

I see absolutely no probative value this could

have, other than the fact that it is being introduced to inflame the jury. And it is not even something he requested in the warrant.

I can't see any materiality to it at all, except it's going to create that inference: Gee, if the guy has a holster, he's got a gun.

THE COURT: Do you quarrel with the statement made by Mr. Kennedy?

MR. DABROWSKI: Well, I quarrel with it, your Honor, in the sense that my intention --

THE COURT: No. I mean with the factual --

MR. DABROWSKI: No, your Honor. I intend to introduce only a black holster through this witness.

THE COURT: And you move to suppress it?

MR. KENNEDY: Yes.

THE COURT: Granted. Motion to suppress is granted; or objection to its admission will be sustained.

MR. DABROWSKI: I have nothing further of this witness then, your Honor.

THE COURT: All right.

You won't be embarrassed if you leave now before the jury comes back?

THE WITNESS: No, your Honor.

THE COURT: You may leave.

(Witness excused.)

THE COURT: Will you have something else?

MR. DABROWSKI: If I may have a minute, your Honor. I don't believe so.

(Pause)

MR. DABROWSKI: No, your Honor. It is the Government's intention to rest at this time.

THE COURT: Are you ready to proceed, Mr. Kennedy, if I call the jury in now?

MR. KENNEDY: If I could have five minutes, your Honor, or just three or four minutes. I just want to get my witnesses lined up.

THE COURT: All right.

MR. KENNEDY: However, before the recess, as long as Mr. Dabrowski is resting, I would like to file a motion with the Court and at this time will move for a judgment of acquittal in the case based on the fact that the United States of America has not proved beyond a reasonable doubt the defendant Wayne Brown was present at the United Bank & Trust in Windsor, Connecticut on the day of the crime. They have offered circumstantial evidence and it is our contention that they haven't proved this, they haven't proved their case as charged in the

indictment.

THE COURT: That's the ground?

MR. KENNEDY: Yes.

THE COURT: Denied.

I will be available as soon as you gentlemen tell me you are ready.

Recess.

(Short recess.)

(In the presence of the jury:)

MR. KENNEDY: Your Honor, the defendant calls Agent David Miller to the stand.

MR. DABROWSKI: Your Honor, before the defendant calls any witnesses, I think it would be more appropriate for the Government to rest. And we do at this time.

THE COURT: All right.

D A V I D W. M I L L E R,

recalled as a witness, having been previously duly sworn, was further examined, and testified as follows:

THE COURT: Mr. Miller, you've taken an oath to tell the truth in this case and that oath is still binding upon you.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Miller, after or on July 10th, did you have occasion, or anyone under your control have occasion to check the bank premises and the items siezed on July 12th from the automobile, did you have occasion to send them to anyone for examination of fingerprint specimens?

A Yes, sir.

Q And exactly what, if you can remember, items were

sent to your laboratory?

A A pair of sunglasses, a bank book, I believe there was another item.

Q A match book?

A Match book, and bank wrappers.

Q Now, did you also check the bank and the counters, that area, for any fingerprints?

A Yes, sir.

Q And would you answer this question for us: Can you tell the jury what is a latent print?

A A latent print is a print that is left by an individual on a counter or someplace that he might touch that is developed, through the application of fingerprint powder or some other chemical means the print is developed.

Q And what specific lab did you send the samples to?

A Those items were sent to our laboratory in Washington.

Q And is it a fair statement to say that this is one of the best laboratories in the world for developing fingerprint material?

THE COURT: You're asking the right man.

A I think so, yes sir.

Q Now, were any latent prints found, or any prints found on the sunglasses, match book, savings book?

A There were none.

Q Were any prints of the defendant Wayne Brown, or anyone else, found anywhere in the bank that would implicate anyone to this robbery?

A To my knowledge, there were no latent fingerprints developed at all in this matter.

Q Now, when did you first send a set of the defendant Brown's prints to Washington, if you can remember? Soon after the robbery?

A No, sir.

Q Well, can you give us an approximate time when you did this?

A It was in November of this year, I believe.

Q Did the defendant Brown consent to having his prints taken by the FBI?

A Yes, sir.

Q And did you take a full workup of his prints?

A Yes, sir.

Q Side views of his hands and fingers, and all this type of thing?

A Yes, sir.

Q And in November no prints were found on anything either, is that correct? His prints were not matched up with any --

A Well, there was nothing to match his fingerprints up with.

Q So that as of today the FBI has no fingerprints of the defendant Brown on any item taken from the bank or on any impression taken from on anything in the automobile, is that right?

A We have developed no connection between the fingerprints of Mr. Brown and anything relating to this matter.

MR. KENNEDY: Nothing further.

CROSS-EXAMINATION

BY MR. DABROWSKI:

Q Mr. Miller, you fingerprinted Mr. Brown and sent his prints down to Washington in November?

A Yes, sir.

Q What was the purpose of that?

A Any time an individual is arrested in connection with a bank robbery it is our policy to submit what we call major case fingerprints of that individual to our Identification Division in Washington, D.C., for the purpose in the event that he might be involved in that particular case or in the future.

Q And there are no prints on file in this particular case among which a comparison could be made?

A There were no latents developed.

Q Is that because Wayne Brown didn't touch anything in the bank?

MR. KENNEDY: Well, I object to that.

How does he know what Wayne Brown touched in the bank, if he was in the bank?

MR. DABROWSKI: I'll withdraw the question, your Honor.

Nothing further.

THE COURT: You may be excused, Mr. Miller.

(Witness excused.)

MR. KENNEDY: Detective Overstrom.

E V E R E T T O V E R S T R O M,
recalled as a witness, having been previously duly sworn, was further examined, and testified as follows:

THE CLERK: Previously sworn, your Honor.

THE COURT: You are also still under oath, Mr. Overstrom.

THE WITNESS: Yes, your Honor.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Overstrom, you previously testified, have you not, that you're one of the investigating officers from the Windsor Police Department concerning this case?

A Yes, I am.

Q Now, was there a time when you were a participant in making up a photographic spread to be shown to witnesses in this case?

A Yes, I was.

Q And would you tell us were there one, two, three - how many spreads were there?

MR. DABROWSKI: Objection to that, your Honor. How many spreads contained the photograph of Wayne Brown, would be a relevant question. But I don't think other spreads has anything to do with this case.

THE COURT: Sustained.

BY MR. KENNEDY:

Q Well, within your spreads did you have both a picture of the defendant Wayne Brown and Arlo Lewis?

A No, sir.

Q Well, were they in different spreads?

A There was two separate spreads. One contained approximately seven photographs and the other spread contained approximately nine photographs. I'm not sure which one contained seven or nine.

Q And in one of those spreads was there a photo of the defendant Wayne Brown?

A Yes, there was.

Q And in the other spread there was a photo of Arlo Lewis?

A That's correct.

Q Now, concerning the spread with the photo of Wayne Brown within it, was that spread shown to customers in the bank?

A It was shown by Agent Miller. It was not shown by myself.

Q Well, were you ever present when those spreads were shown?

A In and out. I wasn't completely present when this was shown to Wayne Brown. In other words, that was -- it was done at the police station and Agent Miller had called

the witnesses in from the bank and they were shown by himself. I was not present when the identification was made.

Q You don't mean "shown to Wayne Brown." You mean a spread with the photo of Wayne Brown within it?

A That's correct.

Q Now, was that same spread also shown to bank employees?

A To my knowledge, yes, it was.

Q Were there any other photo spreads that were used, to your knowledge?

A Not to my knowledge.

MR. KENNEDY: I have nothing further.

THE COURT: That's all?

MR. DABROWSKI: Your Honor, unless there is going to be a further offer of proof with regard to the testimony of this witness, I move to strike his entire testimony as completely irrelevant.

THE COURT: You may step down.

(Witness excused.)

MR. KENNEDY: I think his testimony is highly relevant if he's the man that testified that made up the photo spread.

THE COURT: All right. It may stand.

Will Detective Overstrom be needed any more?

MR. KENNEDY: No, he will not, your Honor.

THE COURT: So far as you are concerned, he may now be excused?

MR. KENNEDY: That's correct.

THE COURT: All right.

MR. KENNEDY: I would like to call Mr. Max Cohn, your Honor.

M A X C O H N, called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Will you state your name for the Court?

THE WITNESS: Max Cohn.

THE CLERK: How do you spell your last name?

THE WITNESS: C-o-h-n.

THE CLERK: And your address, Mr. Cohn?

THE WITNESS: 135 Woodland Street in Windsor.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Now, Mr. Cohn, where are you employed?

A By the Prudential Insurance Company as an insurance agent.

Q Do you also have a part time job?

A Yes, I do.

Q And where is that?

A Bloom's Package Store in Windsor Shopping Center.

Q If you know, is that the same shopping center where the United Bank & Trust Company, Windsor Branch, is located?

A Yes, sir.

Q Do you remember if you were at work on July 10th, 1976?

A Yes sir, I was.

Q And are you aware of anything unusual happening in the shopping center on that date?

Let me rephrase the question. Are you aware that a lending institution was robbed in the shopping center on July 10th?

A Yes, I was.

Q Now, subsequent to the robbery did you speak with either a police law enforcement agent or an FBI agent concerning the robbery?

A No sir, I didn't.

Q You didn't speak to David Miller?

A Who is David Miller?

Q An FBI agent.

A Not the same day.

Q Well, on a subsequent day?

A Yes, I did.

Q Okay. Were you shown some photographs?

A Right.

Q Were you also shown -- strike that.

Could you pick anyone out from the photographs you were shown?

A No, I could not.

Q Were you also shown a photograph taken --

THE COURT: Well, wait a minute here.

You say you became aware of the fact that

there was a robbery at the bank. When did you first learn about it?

THE WITNESS: Shortly after it happened.

THE COURT: Well, how long after it happened? Do you know?

You don't know just exactly --

THE WITNESS: Well, I'd say about ten minutes.

THE COURT: How did you find out about it?

THE WITNESS: Well, I saw the police in front of the bank. I was able to observe the bank.

THE COURT: All right.

Q (By Mr. Kennedy) Do you know approximately what time the bank was robbed?

A No, I do not.

Q Well, prior to seeing the police at the bank did you have occasion to observe anything that you felt was unusual in the shopping center? Anything that attracted your attention?

A Well, it was rather slow at the time and I was standing in the store window and I saw two males walk by, two men that I had never seen before.

I'm pretty familiar with most people in that immediate area, and I had never -- I did not recognize the two men.

Q Can you describe the two men you saw in any way,

shape or form?

A Nothing other than the fact one was considerably taller than the other, and one had a sort of flowered shirt. It was a loud shirt.

Q Did you describe the height or weight of these men to the FBI?

A I don't believe I did.

Q Well, how tall would you say these men are?

A Well, one of them was about six feet and the other was shorter. I just can't give you his exact height.

Q Did you ever tell the police that the other man was approximately five, eight?

A I might have.

MR. KENNEDY: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. DABROWSKI:

Q Mr. Cohn, do you know Special Agent Harry Willis?

A No, I do not.

THE COURT: I don't understand what this has to do with the case.

MR. DABROWSKI: Nor do I, your Honor. But I'm still entitled to cross-examine.

THE COURT: His knowledge of Harry Willis? Or what he has testified to.

BY MR. DABROWSKI:

Q On July 13th, 1976, Special Agent Harry Willis, not David Miller, of the FBI showed you a spread of photographs, is that correct?

A Well, if that's who he was. I can't remember what his name was.

Q All right.

A But I did see photographs.

Q And after looking at the spread of photographs did you know the names of the people that were in the spread?

A No, I did not.

Q After looking at the spread you said and told Agent Harry Willis that you couldn't identify any of the individuals in the photograph as being identical to the two individuals you had seen outside your store sometime around ten o'clock on the morning of July 10th?

A Right.

Q You had seen two individuals who you took some note of on July 10th, is that correct?

A That's right, sir.

Q All right. Now, look around this courtroom. Do you see either one of those two individuals in this courtroom today?

A I can't make positive identification either way.

Q Can you make any type of an identification?

A No, I cannot.

Q Is there anybody in this courtroom that looks like that individual?

A I cannot say positively whether there is or not.

Q Well, I'm not asking you to say positively.

A I can't say yes or no.

Q Is there anybody in the courtroom who resembles the individual in physical size and appearance?

A In color, but that's --

Q All right. Can you say that the gentleman seated at the table here is not the person that you saw?

A I cannot say that.

Q So he could be; maybe he is, maybe he isn't? You don't recall? You don't know?

A No, sir.

Q You said one of them had on a flowered shirt. Ever seen that before?

A I can't say whether I have or not.

Q That may or may not have been the shirt that you saw on the two individuals that morning?

A Right.

Q You really don't remember exactly what you saw, do you?

A That's right.

MR. DABROWSKI: Nothing further, your Honor.

THE COURT: All right.

You can step down.

MR. KENNEDY: Your Honor, I'm going to ask a few more questions.

REDIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Cohn, I'm going to ask the defendant Brown to stand.

Would you stand please.

I want you to observe how tall he is. Now, your best recollection, were the two men you saw outside the bank on that day --

THE COURT: Where did you see these men?

MR. KENNEDY: Excuse me.

Q Outside your package store on that day?

A Yes.

THE COURT: Yes.

Q Were they taller, shorter, the same size?

A One was taller.

Q How about the other one?

A Considerably shorter.

Q Shorter than this man?

A No, no.

Q Shorter than --

A One was taller than this man.

Q How about the other man?

A The other man was taller than this man.

Q Were both men taller than this man?

A Oh, I'm sorry.

One man was tall and one man was short.

THE COURT: All right. There you are.

These are two men that walked past the package store?

THE WITNESS: Right.

Q (By Mr. Kennedy) How close isyour package store to the bank?

A It's within 200 yards, I'd say.

THE COURT: 200 yards?

THE WITNESS: Right.

Q How close did these men walk to your front window of the store?

A Within six feet.

Q And at that time where were you standing?

A Right in front of the window, inside the door.

MR. DABROWSKI: Nothing further, your Honor.

MR. KENNEDY: Nothing further, your Honor.

THE COURT: You may step down, Mr. Cohn. You may be excused.

(Witness excused.)

MR. KENNEDY: The defendant calls Daniel Sudol, your Honor.

J O S E P H K O B Y L A R Z,

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Will you, in a loud clear voice, state your name?

THE WITNESS: Joseph Kobylarz, K-o-b-y-l-a-r-z.

THE CLERK: And your address, Mr. Kobylarz?

THE WITNESS: 31 Evans Drive, Simsbury, Connecticut.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Kobylarz, where are you employed?

A At Royal Typewriter, sir.

Q Do you happen to know if a Wayne Brown was employed at Royal Typewriter?

A Yes, he was.

Q Do you have any connection with him through his employment?

A Yes. He was one of my employees.

THE COURT: One of your what?

THE WITNESS: I was his supervisor. He was working for me at Royal Typewriter.

THE COURT: All right.

Q Did you ever have any trouble with Wayne Brown through employment?

A No, not that I recall ever.

Q What type of an employee was he, in your estimation?

A Conscientious, good worker, fulfilled his orders or commitments that he had to do, and I certainly can't recall any incidents that I would question or have in mind. If he had I'm certain he wouldn't have been employed by us, sir.

THE COURT: Pretty hard man to work for, are you?

THE WITNESS: I am, sir, yes. I'll be truthful, your Honor.

THE COURT: All right.

Q Mr. Kobylarz, when did Mr. Brown work, Monday through Friday, Monday through Saturday?

A Mondays through Fridays. There had been occasions where we were overloaded for work that I had Wayne Brown come in and spend half a day with us. But not too often, no.

Q On the weekend, youmean?

A On a weekend, on a Saturday; yes.

Q Now, did you see him every day he was at his employment?

A Yes, I had. Yes, I had.

Q He was never at work when you didn't see him, is that a fair statement?

A Would you repeat that, sir?

Q Well, every day he would come into work you would see him?

A Oh, yes, yes.

Q Now, are you fairly familiar with what Mr. Brown looks like?

A Yes, sir.

Q You can identify Mr. Brown if you saw him sitting there. You know that that's Mr. Brown at the table there?

A He definitely is, sir.

Q Did there come a time when some FBI agents came to speak with you about Mr. Brown?

A Yes. I believe it was during the week of supposedly the incident that happened for questioning. And nothing had been mentioned why, but just a few questions pertaining whatever they had in mind and we were to only answer those. That's all, sir.

Q Well, did they show you any photographs that were taken of a person standing in a bank?

A Yes, they had, sir.

Q Now, I'm going to show you Government's Exhibit 30. These are a series of photographs. See if any of these photographs look like the photographs you were shown.

A I believe it's this one here, sir.

Q Now I'm going to show you Government Exhibit 27,

which is extremely -- strike that.

Does that look like the photo you were shown also?

A I believe there was only one sheet or one photo that I've been showed. I believe this is the one right here, sir.

Is there a reproduction of this?

Q Well, I don't know.

A Oh, I see.

Q I can't tell you that.

A Are you asking me whether I have ever seen this particular photo?

Q Well, have you seen any of them?

A This one here, sir. By the investigating --

Q I'm not saying they're the same photo.

A All right, sir.

Q Now, were you asked if you could identify the person in the picture, or were you asked if the man in the picture was Mr. Brown?

A Yes, that was the question that I was asked.

Q "Is the man in the picture Mr. Brown"? That's the question?

A And the question was that I had -- I said no, it does not look anything like him, if it's for my own personal description.

Q Now, why don't you think it looked like Mr. Brown?

I mean can you give us any reason?

A No. By the looks, I guess. By the features.

Although I'm sure it does -- no way can I say it is him, sir, no.

Q So you told them that it doesn't look like Mr. Brown to you?

A I believe I had, sir, yes.

Q Now, did you ever have a conversation with Mr. Brown in which he told you anything about returning to his relatives in North Carolina?

A He had mentioned a few times that he would have loved to see his family down South, when some of our holidays had occurred and we had the family gatherings, which naturally you always speak of. I do recall him mentioning that he would like to go down South and visit the family, or friends, or whatever he had in mind.

I do recall that, sir, yes.

Q Well, do you remember at some time prior to last July him saying to you that he hadn't seen his relatives for quite a while, or he hadn't seen them in a long time, or anything along that line?

A Yes, he had.

Q He did say that?

A He had mentioned this to me, that he would like to see them, wherever the location was. He didn't recall the

state, or city, or what have you, sir; no.

MR. KENNEDY: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. DABROWSKI:

Q He didn't come back to work on July 12th, did he?

A You're recalling the Monday?

Q Yes, Monday.

A No, he had not, sir.

Q Was he supposed to?

A Yes, sir.

Q So he talked about going to visit people, but it was at some other time?

A No, I'm not saying that whether he wanted to see the people, that that was not the weekend, no.

Q You had expected him to return to work on Monday?

A Definitely.

Q And he did not?

A And he had not, no sir.

Q You don't know where he was -- strike that.

The last time you saw him was at eleven-thirty a.m. on Friday, is that correct?

A Yes, sir.

Q And at that time he was carrying a brown briefcase, wasn't he?

A He was carrying a briefcase, but I don't know the color, sir.

Q Did you tell the FBI he was carrying a brown briefcase?

A Sir?

Q Did you tell the FBI he was carrying a brown briefcase?

A No, I did not say. All I know is that he had a briefcase. But what color or what make, I did not say, no.

Q Well, I'm showing you a document.

A Yes, sir.

Q Well, let me ask you this: On July 12th, 1976, did you have a conversation with a Special Agent of the FBI? That was Monday. Special Agent Harry Willis?

A Whatever day that they did visit Royal, sir, the group of people were together and I had been one of them, sir.

Q And at that time you told him the last time you saw Wayne was eleven-thirty last Friday?

A Was Friday at eleven-thirty, when he was excused.

Q And you also told them when Brown left he was carrying a dark brown briefcase?

A No, I didn't mention what color, sir. But they did ask me whether I recalled. And he does carry or had carried a briefcase daily, sir; every day that he came to work, sir.

Q Had you ever seen that briefcase?

MR. KENNEDY: Your Honor, I'm going to object to anything more on the briefcase.

A I can't recall seeing this.

MR. KENNEDY: Excuse me, Mr. Kobylarz.

I'm going to object to any more questioning. It is beyond the scope of my Direct.

He already asked a few questions. I didn't ask him anything about a briefcase.

MR. DABROWSKI: I'll withdraw that question, your Honor.

BY MR. DABROWSKI:

Q When he left on Friday at eleven-thirty, do you know what kind of a car he was driving?

A No sir, I don't.

Q Didn't he have a dark green Camaro?

MR. KENNEDY: Your Honor, I'm going to object to this question. It is beyond the scope of the Direct.

THE COURT: Overruled.

Q On July 12th, 1976, did you tell Special Agent Harry Willis that he was driving or that he drives a dark green Camaro?

A I do recall him owning a dark -- not dark, but a green Camaro, yes.

Q A green Camaro?

A I do recall stating to the investigator that he owned a Camaro car, yes.

THE COURT: How did you know he owned one?

THE WITNESS: Because at one time I happened to be parked a few cars away from him, your Honor, and he and I come into work and he had showed his car to me, sir.

THE COURT: I see. All right.

BY MR. DABROWSKI:

Q Showing you Government's Exhibit 25(c), which is a full exhibit, was that his Camaro?

MR. KENNEDY: I object, your Honor.

Not only is it beyond the scope of the Direct, but the other factor is we stipulated in this case and I don't understand these questions - we stipulated that, number one, the car is registered to Wayne Brown and, number two, he purchased the car on June 15th from A.C. Hine Pontiac.

So if this man can say it is Wayne Brown's car, what's the difference?

MR. DABROWSKI: There's a big difference, your Honor, if he can say or did say it was his car on July 9th, Friday.

We stipulated that the car was bought and it

was his car on June 15th, your Honor.

MR. KENNEDY: And it was f. nd in a parking lot, and when it was found in a parking lot we are stipulating that the car was registered -- that car was registered to Wayne Brown.

MR. DABROWSKI: If Mr. Kennedy would further stipulate it was in his possession on that date, then I would withdraw the question.

MR. KENNEDY: I'm not going to stipulate the car was in his possession because I don't know if it was.

If he can testify that the car was in his possession on July 9th, I have no objection to that question.

THE COURT: Well, the question is what?

(Question read back.)

THE COURT: Do you know whether the one in the picture was his?

THE WITNESS: I don't know whether this is the car or not.

THE COURT: All right.

THE WITNESS: But all I know, sir, or your Honor, is that it was green and it was a Camaro. But what year, your Honor, I couldn't say.

THE COURT: Okay.

THE WITNESS: But this was months ago that he had showed this to me, when he first picked it up.

THE COURT: Anything else?

MR. DABROWSKI: No, nothing further, your Honor.

THE COURT: All right. Mr. Kobylarz, you are excused.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. KENNEDY: Your Honor, may the defense have a short recess?

We have another witness, or possibly two, but I don't see them in the courtroom. I'm going to have to go see if they are in the hallway.

THE COURT: Well, with reluctance, we will allow a short recess.

(Short recess.)

F R A N C E S S U L L I V A N,

called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please state your name.

THE WITNESS: Frances Z. Sullivan.

THE CLERK: And your address, Mrs. Sullivan?

THE WITNESS: 43 Barber, Windsor.

THE CLERK: That's Windsor, Connecticut?

THE WITNESS: Windsor, Connecticut.

DIRECT EXAMINATION

BY MR. DABROWSKI:

Q Mrs. Sullivan, how are you employed -- or are you employed?

A Right now I'm a housewife.

Q Now, are you appearing here today pursuant to a subpoena?

A No, I'm not.

Q All right. You're not appearing here under any subpoena issued by the Government, is that correct?

A That's correct. I was asked to come.

Q But you did just talk to me out in the hall?

A That's right.

Q And you had previously talked to me on the telephone, is that correct?

A That's correct.

Q Now, do you recall where you were on Saturday, July 10th, 1976, at approximately eleven a.m.?

A I was seated in an automobile right directly opposite the Easton Dress Shop in the Windsor parking center.

Q Where is that in relation to the United Bank & Trust Company's Windsor Branch?

A Well, it's like northwest, in a northwesterly direction.

Q And what were you --

A At a diagonal.

Q Approximately how far away?

A I would say about sixty feet away or so.

THE COURT: From what? The bank?

THE WITNESS: From the bank entrance, yes.

Q (By Mr. Dabrowski) And what were you doing there?

A I was waiting for a friend who was doing business in the bank.

Q Who was that friend?

A Marilyn Bonvouloir.

Q Now, when you say "waiting for a friend," did Marilyn Bonvouloir get out of your car and go into the bank?

A It was her car.

Q Excuse me. I'm sorry.

A She drove. It was her car.

Q All right. She got out of the car and went into

the bank?

A And went into the bank.

Q How long was she in the bank?

A Well, she must have been in ten minutes or longer. I saw patrons coming in and going out. Still waiting, while I was waiting for her.

Q Was your wait extended for any reason? Did anything happen?

A No, no.

Q Had she later told you that anything had happened when she was in the bank?

MR. KENNEDY: I object to what she was told.

THE COURT: Well, did you become aware that something had happened in the bank while she was there?

THE WITNESS: I was aware because several people had gone into the bank and had come out, and in the meantime two neatly dressed dark men had gone in and had come out, and it was after they had left that she opened the door and motioned to me that a robbery had taken place.

THE COURT: I see. All right.

BY MR. DABROWSKI:

Q Could you describe these individuals, as best you can? I mean were they --

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A Well, they were two slightly built dark men.

THE COURT: What do you mean by "dark"?

THE WITNESS: Black men.

THE COURT: Black?

THE WITNESS: Black.

THE COURT: All right.

THE WITNESS: Very dark complected.

THE COURT: Yes.

THE WITNESS: Walking single file from the side of the bank where the drive-in teller is, and walked single file in front of the bank and inside.

THE COURT: Yes.

THE WITNESS: No one had gone in after they had gone in. And they came out in about four minutes, I guess, five minutes at the most.

THE COURT: Yes.

Q (By Mr. Dabrowski) And no one came out of the bank while they were in the bank?

A No, no. But several people had gone in and had come out before they had gone into the bank, while I was waiting for her.

Q Now, did you see them come out?

A The other people?

Q No. The two black males.

A The two black men? Yes, I did.

Q Where did they go?

A They walked -- they went in the same direction from whence they came: right in front of the bank, up the side, and I couldn't see from where I was sitting where they had gone any further.

Q Now, when you say "up the side," you mean by the drive-in teller's window?

A Yes, yes.

Q All right. Now, were either one of them wearing a hat?

MR. KENNEDY: Your Honor, I'm going to object.

A The first one was.

MR. KENNEDY: I'm going to object to any more --

THE COURT: Sustained. That's a leading question.

MR. KENNEDY: That's not my objection.

THE COURT: What is it?

MR. KENNEDY: My objection is, as Mr. Dabrowski quite knows, he's supposed to be putting in rebuttal evidence to something I put on in my case.

I never asked anyone any questions about hats, clothing, and this type of thing. This is supposed to be rebuttal evidence and because it is rebuttal I do not have any statements this woman made to the

FBI.

If he wanted to put this woman on in his case in chief, he could have done so.

THE COURT: I don't know whether he could have or not.

MR. KENNEDY: Well, I don't know if he could have. But he's not rebutting anything on any of my evidence that came in.

MR. DABROWSKI: I know of absolutely no authority under which the defendant is entitled to statements of witnesses of the Government on rebuttal. The Jencks Act with which he's referring --

THE COURT: We are not talking about whether he is entitled to statements of witnesses on rebuttal. His objection is what it is rebutting.

MR. DABROWSKI: That is correct, your Honor.

My understanding of his claim is that it was twofold. One is that he did not have Jencks Act material.

THE COURT: Yes.

MR. DABROWSKI: Jencks Act material does not apply to a rebuttal witness.

THE COURT: Yes. All right.

MR. DABROWSKI: His second objection is that I'm going beyond the scope of his Cross-Examination,

or beyond the scope of any theory he may have raised in his defense.

He has directly raised the theory that someone else may have robbed the bank - for example, Mr. Ortiz.

THE COURT: It is rebuttal of the evidence that it was somebody else.

MR. DABROWSKI: Well, I intend to ask this witness, your Honor, if she recognizes anyone in this courtroom as being identical to --

THE COURT: Overruled.

MR. KENNEDY: Well, your Honor, first of all, he misstated my objection.

I'm not claiming that I'm entitled to Jencks Act material. What I'm saying is that unless he is rebutting something that I put in and due to the fact that he's supposed to be limiting his examination to evidence that I put in, and also due to the fact that I don't have the opportunity to have statements she made to the Government or FBI material, I think he should limit himself to a direct rebuttal.

Now, if he wants to ask the witness is that the identical man that you saw, I have no objection. That may rebut Mr. Ortiz.

But to show hats and shirts and things, I never went into this.

MR. DABROWSKI: Your Honor, for purposes of the Jencks Act, even though it doesn't apply, I would be more than happy to supply counsel with a copy of Mrs. Sullivan's statement to the FBI. The statement is simply three paragraphs long. It wouldn't take him long to review.

He did see this out in the hall anyway, your Honor. I went over it with him.

I read it word for word in the second paragraph, the key paragraph.

MR. KENNEDY: Well, the objection still stands. Unless he can limit his examination of this witness to something rebutting this evidence --

THE COURT: There's no question pending right now.

BY MR. DABROWSKI:

Q Could you describe, with a little more detail by virtue of what they were wearing, these two individuals?

A Well, the first one had on a light shirt with some sort of a figure or design, dark trousers, a small summer hat, large dark glasses. But I couldn't identify any facial characteristics.

Q Showing you Government's Exhibit 2, do you recognize

that hat?

A I thought it was a lighter colored one. No, I don't.

Q Other than the color, is the hat similar to the one that was worn?

A It looked more --

THE COURT: If you don't, you don't recognize it.

A No, not that one.

Q Were they carrying anything?

A The first one had a briefcase and the second one I'm not positive, but he was carrying some sort of a case. Whether it was --

Q Do you remember what color it was?

A The first one was dark. The second one could have been, but I'm not certain.

Q Showing you Government's Exhibit 12, do you recognize this?

A Well, from the distance that I was, it could very well have been.

Q In what way?

A Well, it's just that it's a briefcase type of bag.

Q You said it was dark black?

A It was dark.

Q Was it this type of a style, for example, as opposed

to this type of a style? And I'm showing the witness, in addition to Government Exhibit 12, Government Exhibit 11.

A No, that confuses me.

THE COURT: All right.

A I mean both on the same type. But I'm not certain.

Q Mrs. Sullivan, would you look around this courtroom and would you tell the ladies and gentlemen of the jury whether you see either one of those individuals in the courtroom at this time?

(Pause)

A Well, I can't be sure.

Q Well, do you think you see him?

MR. KENNEDY: I object to that. She either sees him or she doesn't.

THE COURT: All right.

MR. DABROWSKI: I'll strike that.

Q What do you mean by "I can't be sure."

A Well, I would be able to recognize the party by the walk and by the size.

Q When you said you can't be sure, did you have any particular individual in this courtroom in mind?

A Well, I suppose the defendant.

Q Well, don't suppose. Don't suppose. I mean --

A Well, as far as I can see, the defendant might be similarly built to the party that I saw.

Q That may, however, be because he's a black man, just like the other fellow was a black man, too, is that correct?

A Mainly because of his built.

Q Was the build of the man you saw similar to the build of this individual?

A Yes.

Q Now, in addition, is the tone of this particular black individual's skin seated in this courtroom the same tone, the same degree of blackness as the individual you saw outside of the bank?

A I would say yes.

Q Is there anything else that's similar about them?

A No. Well, the haircut or the hairdo. And that would be about it.

MR. DABROWSKI: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. KENNEDY:

Q Well, Mrs. Sullivan, first of all how far away were you from these men when they came out of the bank? Were you as far from the back of the courtroom to where you are sitting, or were you farther than that?

A Probably a little further.

Q A little further.

Was it pretty -- is it a fair statement to say it was pretty hard to see their faces from that distance?

A Yes, I would.

Q Now, this individual you were talking about that was similar in build to this man, did he have a hat on?

A Yes.

Q Was the hat a little cap up on top of his head?

A No, it wasn't a cap. It was one of those summer type, either a little straw or a denim, with a little brim around. It wasn't a cap.

Q Did it cover most of his head?

A Well, yes, it sat right on top of his head.

Q Was it pretty difficult, then, to see his hair under the hat?

A Well, yes.

Q Yes. Now, as far as the tone of his face, the tone of his blackness, if you were as far away as that back wall of the courtroom to where you are sitting now, would it be pretty difficult to tell the difference between one black man and another, the shades in their faces? Would you say it would be pretty difficult? Is that a fair statement?

A No, I don't think it would be difficult for me to see the shade.

THE COURT: You mean so far as color?

MR. KENNEDY: Yes.

Q (By Mr. Kennedy) So far as color.

A Yes.

Q I mean I imagine you could tell the difference between someone who is extremely light and someone who is dark.

A That's right.

Q But how about anything in the middle - is it fair to say it would be pretty difficult to see that, from that distance?

A No, I think I would have been able to see a medium shade.

Q Okay. And what you are saying is this man is a medium shade?

A Oh, no.

Q He's a dark shade?

A I would say so, yes.

Q What about the other man?

A Well, they both looked very similar in stature, and built, in color and all.

Q Did they both look dark to you?

A Yes, they did.

Q Now this man that was supposedly wearing the hat, did he have a mustache?

A I'm pretty certain he did.

Q Did you talk to a defense investigator in this case,

a Mr. Neddow?

A Yes, I did.

Q Did you tell him that the man had a mustache?

A I don't recall, because it was a telephone conversation.

Q But you're pretty certain today that he did have a mustache?

A Yes.

MR. KENNEDY: I have nothing further, your Honor -- I have one further question:

Q You cannot then tell us whether the man sitting in the courtroom is the man you saw, is that right?

A No, I can't.

REDIRECT EXAMINATION

BY MR. DABROWSKI:

Q You're not absolutely sure he had a mustache, is that correct?

A I'm pretty sure he did.

Q And if he had one in your opinion --

A Pardon me. Well --

Q Is one of the reasons that you can't positively identify the individual seated in this courtroom as the individual you saw is because he does not have a mustache today? Would that make a difference?

A Yes. And, of course, without the glasses and the

hat, and all of that.

Q I am showing you Government's Exhibit 1 for identification, a pair of sunglasses.

A Yes.

Q Do you recognize those?

MR. KENNEDY: This wasn't covered in the Cross-Examination, your Honor.

THE COURT: Sustained.

A I couldn't say. I mean I was too far away for that. Only that they looked very dark.

MR. DABROWSKI: Well, your Honor, I believe it was covered.

I would like to show her some of the other exhibits.

I'll withdraw the question. Nothing further of this witness, your Honor.

THE COURT: You are excused, Mrs. Sullivan.

(Witness excused.)

MR. DABROWSKI: The Government rests its rebuttal.

THE COURT: Anything further?

MR. KENNEDY: Nothing further, your Honor.

THE COURT: All right.

What do you want to do? I guess the best thing to do is for us to -- do you want to offer

(Summations of counsel having been given, the Charge by the Court followed:)

THE COURT: Ladies and gentlemen of the jury, the presentation of the evidence in this case and the arguments of counsel have been completed. I shall now charge you on the law as it applies to this case.

But, first of all, I want to thank you for your attendance and your constant and alert attention that you have given to the case throughout the trial.

It is your duty as jurors to take and to follow the law as the Court states it to you. Appealing as it might be to you, you are not permitted to dispense your own individual or collective brand of justice, but you must be governed in your consideration of the case by the law given by the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial of those allegations made by the not guilty plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law doesn't permit jurors to be governed by sympathy,

prejudice or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict.

It is the exclusive province of the jury to determine the facts in the case and in making that determination to consider and weigh the evidence. Your recollection of the evidence controls. You have been told that it's not the recollection of counsel and it's not the recollection of the Court.

If I should mention some evidence in the course of the Charge and not mention other parts of the evidence, you should not fail to consider all of the evidence that is before you. Because, as I say, it is your recollection of the evidence that controls.

And if I should mention some, it is only for the purpose of illustrating a point of law, not because the evidence I mention is regarded by me to constitute proof. That is your decision to make.

In every serious criminal case, as you know, the proceedings usually begin with an indictment by the Grand Jury. The indictment is merely the formal way in which the Government brings a case into Court.

And I instruct you again, as I did when you were selected, that the indictment is not a part of the evidence in the case, not even in the slightest degree evidence of the guilt of the defendant or of what is charged in the indictment. Because I told you how the Grand Jury arrives at an indictment.

You will be permitted to take with you into the jury room a copy of the indictment under which the defendant is charged here. He has entered a plea of not guilty to those charges. In effect, what that means is he denies each and every allegation that is set forth in the indictment.

So upon the issues joined in that way the burden is upon the Government to prove, beyond a reasonable doubt, all of the material elements of the crime charged in this count here in order for you to find the defendant guilty.

The indictment here is short and I am going to read it at this point. It charges:

"On or about July 10, 1976, in the District of Connecticut, Wayne Brown and Arlo Lewis, the defendants, by force and violence, or by intimidation, wilfully and unlawfully did take from the person and presence of another the approximate sum

of $2,147 in money belonging to and in the care, custody, control, management and possession of the United Bank & Trust Company, Windsor Office, 494 Windsor Avenue, Windsor, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation . . ." in violation of a certain statute of the United States. .

Now, we all know that Arlo Lewis, who was charged in this indictment, is no longer a defendant in this particular case. Well, he is not at the trial, at least. He has agreed to plead guilty and the Government has agreed to present him on a charge which carries a lesser penalty, but a charge which, nevertheless, arises out of this same transaction that is alleged in the indictment. I will tell you a little bit more about that later.

But in a case, which this was, where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged. Because there is another statute which provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Now, that has some significance in this case because I think the evidence indicates that it was at the time of the robbery within the bank the money was actually taken originally out of the tellers' drawers by Arlo Lewis. There is some evidence, I guess, that it was put into a bag given to him by Wayne Brown, the accused. There is some evidence that the bag was handed to Wayne Brown before they got out of the bank, or very shortly after it.

So that it is significant to recognize that the law provides that the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged if he was aided by another, or if he wilfully caused the act to be done, which if directly performed by him would be an offense against the United States.

All right. That indictment will go with you when you retire.

The statute that is involved in this case is one which in pertinent part provides this, and I

quote:

"Whoever, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another any property, or money, or any other thing of value belonging to or in the care, custody, control and management, or possession of any bank, shall be guilty of violating the law."

What does that mean? Now, there are five essential elements there of the offense which are charged in this indictment. The Government has the burden of proving each one of them beyond a reasonable doubt.

These essential elements are: First, the taking of money which belonged to or was in the custody, control, management or possession of a bank, a bank whose deposits were insured by the Federal Deposit Insurance Company.

I'm not sure, but it seems to me - it is for you to decide - that there is not really a dispute in this case that the bank was robbed, that money was taken, and that the bank's deposits were insured. But, at any rate, it is up to the Government to prove these facts by evidence which satisfies you beyond a reasonable doubt.

A second element is that the taking of the money was accomplished by means of force and violence, or by intimidation. And I will explain that more fully to you.

Third, that the money was taken from a person or in the presence of another person in the bank.

Fourth, that the acts alleged were done wilfully, that is, voluntarily and intentionally, and with a specific intent to do something which the law forbids, that is to say with bad purpose either to disobey or disregard the law.

And, fifth, that the defendant Wayne Brown was one of the persons that robbed the bank on that occasion.

As to the first essential element, that is, the taking of the money, it is necessary that the Government prove, beyond a reasonable doubt, that property or money belonging to or in the care, custody, control, management or possession of a bank whose deposits are insured by the Federal Deposit Insurance Corporation has been taken.

As used here the word "take" has its ordinary meaning; that is, to seize, remove, carry away.

The words "belong to", "care," "custody," "control," "management" and "possession" also have

ordinary meanings.

It is the claim of the Government that there was an unlawful taking of the money which was in the care, custody, control, management or possession of the bank, and that the taking was from another.

In this respect you can consider the testimony of Joseph Lupacchino that approximately $2,147 was taken during the robbery. You will recall he said something about that an audit was done right away and that amount of money was missing.

And there was evidence, I guess, that at the time this was done there were bank employees, as well as others, but primarily bank employees, including Joseph Lupacchino himself, Mae Johnson and Linda DePascale, who were present in the bank and were employees and had custody of the money at the time it was taken from the bank.

Also, the Government must prove that the Windsor Branch of the United Bank & Trust Company was insured by the Federal Deposit Insurance Corporation. And with regard to that, you have the testimony of the manager, Joseph Lupacchino, and you will have with you in the jury room a photocopy of the bank's Federal Deposit Insurance

Corporation certificate. That's as to the first element.

As to the second, the Government must prove that the taking was by force and violence, or by intimidation. Now, force and violence means the use of actual physical pressure or constraint. It means such a display of physical prowess as is calculated to inspire fear of physical harm to those opposing the will of the person exerting the force.

But force and violence doesn't necessarily include actual physical contact, although it may. Any conduct which would result in bodily fear or terror would be sufficient to constitute force and violence as used in this statute.

I won't discuss what the evidence was in that respect. That was probably the most dramatic moment of this episode and I am confident that you will remember the testimony of the witnesses as to how they felt at the time this robbery took place.

Intimidation is also used in the statute and has a somewhat although not altogether different meaning. Intimidation is sometimes referred to as constructive force. In general, it means to fear or to inspire with fear. This fear or terror may

be inspired without physical violence or even spoken threats. It may be accomplished merely by a menacing attitude and a display of force.

If you believe the testimony of Mrs. Johnson, there was a display of force and intimidation - the pointing of the gun and a statement to everybody to "Freeze" and to get down on the floor. If you find from the evidence that that is what occurred, you would be able to find that that satisfies the requirements of intimidation.

Putting in fear must arise from the conduct of the defendant rather than from the timidity of the person in whose presence or from whom the taking occurred.

Now, there was one witness in the bank, he was a customer, and he saw two men, he says, coming in, one carrying a briefcase or a bag, and he said to himself "Oh oh," and he got worried right then and there.

Now, that would be a case of where he, himself, might have been timid and there was nothing really intimidating in the fact that two men walked into the bank, one of them carrying a suitcase or a briefcase.

But there is more. There was evidence of more

conduct on the part of these defendants and on the part of this accused, Wayne Brown, and you will consider whether or not that conduct amounted to intimidation so as to put others in fear.

It is the claim of the Government that there was force and violence used by means of a gun that was pointed at some of the people in the bank, in connection with commands to them to freeze and to get down on the floor, and that that constituted force and violence. And their claim is that the taking of the money which was in the custody, care and control of the bank was accomplished by the intimidation or putting the victims, that is the personnel in the bank, in fear of danger to their persons.

Well, those are elements of the case that the Government would have to prove in order to find the defendant guilty.

Now, there is another element. The third one is that the taking must be from a person or in the presence of another person. So here again you can consider the testimony of Mr. Lupacchino and the other personnel in the bank, that they were present and that it was taken from their presence.

Now, for the fourth essential element you must

believe, beyond a reasonable doubt, that these acts were done wilfully. The defendant can only be guilty if he intended voluntarily, intentionally and with bad purpose to do what the law prohibits.

I don't think anybody has claimed that whoever it was who did this was doing it just playing games. But it is essential, nevertheless, that the Government prove that if Wayne -- it's a question of identification here with respect to the defendant Wayne Brown. But it is necessary to prove that, if he took it, it was done with the intent and purpose to do what the law prohibits.

In every serious crime there must exist a union or a joint operation of a wrongful act and intent. The burden is on the prosecution to prove both the wrongful act and the intent, beyond a reasonable doubt.

So in this case, specific intent must be proved. That is, as the term itself suggests, it requires more than a general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires - which we don't have here - intending to disobey or disregard the law, may be found to act with specific intent.

So the question is whether the defendants intended to rob the bank, because that is what the law forbids.

The fifth and final element to be proved is that it was Wayne Brown, he is the man who is being tried here today on this charge; that he was one of the persons who committed the robbery on July 10, 1976.

Those are the things the Government has to prove.

Well, they've got to prove it. So you start out this way - you start out that every person, and this refers to Wayne Brown, accused of a crime is presumed to be innocent until proven guilty, beyond a reasonable doubt.

That presumption of innocence was with him when the case started and it is still with him. It continues as a presumption, ladies and gentlemen, when you go to the jury room and up to the moment that you reach your verdict. So the presumption of innocence remains in a criminal case until it is overcome by evidence satisfying you beyond a reasonable doubt that the defendant committed the crime charged against him.

So unless the evidence in support of the

charge against the defendant is clear, convincing and sufficiently strong to convince you, beyond a reasonable doubt, that the defendant is guilty, you must acquit him of such a charge. The presumption of innocence, as I have indicated, stays with him until out of your deliberations the evidence satisfies you that he is guilty beyond a reasonable doubt.

Who's got to prove it? That's the amount of proof that is required, and the burden of proving it is on the Government. He doesn't have to prove his innocence. He can say nothing. The Government has to prove it.

And I'm not sure that that's all he's done in this case. I think he has made a claim beyond that. But at least as to that, the defendant's position is the Government hasn't proved it.

Whether the burden of proof resting upon the Government is sustained depends not on the number of the witnesses, not on the quantity of the testimony, but on the nature and quality of the testimony, whether from the defendant's witnesses or from the government's witnesses.

You are not to be influenced by any disposition that the Court made of any motion or objection

during the trial, any ruling on evidence, or any -- I don't know that I made any comment to counsel. Because that doesn't indicate any opinion by me as to the guilt or innocence of the defendant.

I'm not going to indicate any opinion. I have my job, you have your job. And that is yours. It is your job to make that determination, not mine.

The due enforcement of the law is a challenge to our sense of duty. It makes a strong call upon the Court and the jury in every criminal case. But the due enforcement must never override the obligation of another law, which is to make sure that no man is found guilty of a crime unless the evidence points to his guilt with the degree of certainty which the law requires. As I say, I will tell you about the degree of certainty in a second.

But, anyway, you have to reach your verdict solely on the basis of the evidence presented under the instructions of the Court.

He's got a presumption of innocence. The burden is on the Government to prove that he is guilty.

Now, how much proof? I'll talk about that.

In order to convict one accused of crime, the

jury must be satisfied, beyond a reasonable doubt, of the defendant's guilt. A mere preponderance of the evidence is not enough.

If a reasonable doubt does exist in the minds of the jury, they must acquit the defendant. But if the evidence justifies, in your judgment, the conclusion that the accused is guilty so as to exclude every reasonable doubt as to his guilt, you will find him guilty.

What do we mean by a reasonable doubt? Obviously, you can't prove very many things to an absolute certainty. So when I say reasonable doubt I don't mean to be understood as stating that the defendant must be found guilty beyond all doubt whatever, but guilty beyond a doubt founded in reason and arising from the evidence.

Reasonable doubt is a doubt arising from the evidence, or from a lack of evidence, after consideration of all of the evidence.

You will recall there are arguments here on the question of identification, particularly, that there is a lack of evidence. And argument has been made that because of that lack of evidence there is a reasonable doubt.

A reasonable doubt is a doubt that is founded

in reason. It is not a vague, speculative, imaginary something. But it is the kind of a doubt that would cause a reasonable man or woman to hesitate to act upon that doubt in matters of importance to themselves.

This is a matter of importance to Wayne Brown. If you have a reasonable doubt that would cause you to hesitate to act, a doubt which is of the kind in a matter of importance to yourself, that is the kind of a doubt that you have to take into account. And if you have that kind of a doubt, you must acquit the defendant. But if you don't have that kind of a doubt and you are otherwise convinced that the defendant is guilty, then you should find him guilty.

I will put it another way. I hope it won't make it confusing for you. A reasonable doubt means such a doubt as will leave the juror's mind, after candid and impartial consideration of all the evidence, so undecided that he is unable to say that he has an abiding conviction or assurance of the defendant's guilt.

As I say, the law doesn't require a person to be proven guilty beyond a mathematical certainty, but only beyond a reasonable doubt.

So if, after you have carefully considered and weighed all of the evidence in the case and the lack of evidence, in the light of the law as I have given it to you, you have a firm, full and abiding conviction that the defendant is guilty as charged in the indictment, and that his guilt has been established beyond a reasonable doubt, you should find him guilty.

But if you don't have a full, firm and abiding conviction, and you do have a reasonable doubt, then you should acquit the defendant.

In order to convict one accused of crime all of the elements of the crime must be proven, beyond a reasonable doubt. So unless you conclude that all the material elements, as I have identified them to you, have been committed by the defendant, and that each of those elements have been proved beyond a reasonable doubt, if you don't find that you've got to bring in a verdict of not guilty.

Shall I go back? There are a lot of elements - five of them, I mentioned. Presumption of innocence. The burden is on the Government. How much of a burden? Proof beyond a reasonable doubt from the evidence.

Now, what is evidence? Evidence is only that

which is properly admitted in the case. Hopefully, you don't know anything more about this case than what you have heard right here and what has been presented to you. But that's all you can consider.

It includes the sworn testimony of the witnesses, the exhibits which have been admitted into the record, facts stipulated to by counsel. And we have some facts stipulated to. You will have these stipulations.

I just call your attention to this point to the stipulation about the green Chevrolet Camaro: that it was registered to the defendant Wayne Brown and that it was purchased by him on June 15 of '76.

Then there is another thing they stipulated to - and this is evidence you may consider - and this has to do with the fact that Mrs. Dallaire of Windsor, Connecticut telephoned the Windsor Police Department, you will recall, and advised Detective Overstrom that her son and a playmate, while playing in a wooded area behind the house, found some things and the police thereafter came out. So those are things that are evidence.

The indictment, itself, is not evidence. Statements of counsel are not evidence.

There are two types of evidence, generally,

and this case illustrates the two types.

One is direct evidence - such as the testimony of eye witnesses. And we have had some of that here. There were eye witnesses to this robbery.

The other is circumstantial evidence - the proof of a chain of circumstances pointing to the commission of the offense.

The Government claims that there is direct evidence which identifies Wayne Brown as being in the bank at the time of the robbery, and they also claim there is circumstantial evidence that he was there.

The circumstantial evidence would be evidence that the clothing of his was found in the woods nearby, that a car owned by him was found a very short distance from the scene, abandoned there; that that shows that he was there. And that some of that evidence found in the woods consisted of what they call a bank wrapper.

Is that what they call it? Well, you will remember what they call it - a band holding together five hundred dollars, in one case, and a hundred dollars, in another case, of the Windsor Branch of the bank.

They say, you know, somebody brought this here,

Wayne Brown was here, Wayne Brown's clothes are here, Wayne Brown's car is nearby. They say this is circumstantial evidence from which you may infer that he is one of the men who was in there and robbed the bank that day.

Now, circumstantial evidence was received and it may be received in a case. It is entitled to such consideration as you may find it deserves, depending upon the inferences you think it necessary and reasonable to draw from that evidence.

No greater degree of certainty is required when the evidence is circumstantial than when it is direct. For in either case you must be satisfied beyond a reasonable doubt of the defendant's guilt.

Circumstantial evidence, then, consists of facts proved from which the jury may infer, by a process of reasoning, other facts sought to be established as true.

Different inferences, however, may be drawn from the facts and circumstances in the case whether proved by direct or circumstantial evidence. The prosecution asks you to draw one set of inferences, while the defendant asks you to draw another.

I have indicated what the prosecution asks you

to infer. The defendant says, well, the Government is asking you to infer that Wayne Brown was there because of these things. But he asks you to infer that Wayne Brown wasn't there because there were no fingerprints, and nobody saw him there, and at least no one was able to say with positive sureness that they could identify Wayne Brown here as the man who was in the bank at the time of the robbery. So he asks you to infer from the fact that people couldn't identify him, that that's because he wasn't there.

Those are questions which you have to decide. You may infer from the evidence, and from the lack of evidence, what is reasonable in deciding which inferences to draw.

If all the circumstances taken together are consistent with a conclusion that Wayne Brown was there and participated in the robbery, you may, on the basis of circumstantial evidence alone, determine that he was guilty, if you are convinced beyond a reasonable doubt. If you are not convinced beyond a reasonable doubt, then it is your duty to acquit him.

So that's some of the circumstantial evidence. Of course, the classic case is the case of Robinson

Crusoe when he went down one morning and he saw a footprint on the sand, and he knew he hadn't been there. So somebody else was on this island, says he to himself, and he was convinced, and he was right. He didn't know who it was, but that was circumstantial evidence because he hadn't seen anybody, but the footprint was there and that was enough. That's just an illustration of what circumstantial evidence is.

You've heard testimony also that the defendant was arrested at LaGuardia Airport in New York, in the airplane boarding area at the terminal there, two days after the robbery, and at the time of the arrest he falsely identified himself as Willie Wright.

Now, I instruct you that you may consider this in the course of your deliberations. The intentional flight, if that's what it was - the argument has been made that he was just on his way to South Carolina, wherever it was, to visit friends or family; that he expressed a desire before to get down there for such a visit and that this flight down there was nothing more than a pleasure trip, or to satisfy a desire to see his old friends.

But the intentional flight or concealment of

a defendant immediately after the commission of a crime or after he is accused of a crime that has been committed is not, of course, in itself sufficient to establish his guilt. But it is a fact which, if proved, may be considered by the jury, in the light of all the other evidence in the case, in determining guilt or innocence.

So whether or not this was flight or concealment, and if it was whether it shows a consciousness of guilt of having committed a robbery of the bank rather than for some other reason, the sole significance to be attached to that evidence is exclusively within the province of the jury.

That's what the thinking qualities are for. The jury has to consider what is logical and what is reasonable to infer whether the basis from which the inferences made is sufficiently present.

Now, Wayne Brown's theory of the case is simple. He claims that on July 10th he didn't take $2,147 from the United Bank & Trust Company, as the Government charges in the indictment.

In that connection, there has been evidence here in support of a claim that he has an alibi. Evidence has been introduced tending to establish an alibi, and that amounts to a contention that he

wasn't present at the time when or at the place where the alleged crime was committed.

You will recall I think it was Willie Wright -- no. Who was it? That's the name he took. But someone from Hartford testified here that he got on a bus with Wayne, somewhere around -- I don't know that a time schedule was ever brought in, but it was somewhere around noon of that day, maybe a little before, maybe a little after, I've forgotten, and that Wayne was consequently not in Hartford at all at the time that this crime was committed.

If after consideration of all the evidence in the case you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must acquit him.

On the other hand, if you don't have any doubt or you are not satisfied that he was elsewhere, then he has not established the alibi.

You will always bear in mind that the law never imposes, in a criminal case, the burden or duty of calling any witnesses or producing any evidence on the defendant. He didn't have to do anything. The Government has to prove that Wayne Brown was there at thetime this offense was com-

mitted and that he participated in that bank robbery.

So in performing your function now one of the things that you have to do is to pass upon the credibility of the various witnesses who have appeared before you. In passing on the credibility of each of the witnesses there are certain considerations you may well have in mind.

One of these is the appearance of the witness on the stand. Did he appear to be telling the truth? Did he appear to be honest? Did he appear to be intelligent; that is, did he appear to be a person who could have observed accurately what he is telling you about, who would be likely to have remembered it accurately and who was capable of reporting it to you accurately?

Another question for you to have in mind as regards a witness is the question as to whether the story he has told you is plausible. Does it ring true or are there inconsistencies in it? How does it fit in with the other evidence in the case? Does it jibe with that evidence and those facts? In short, does the testimony that was given by a particular witness whose credibility you are considering seem to you to be plausible?

Now, in this connection you should also bear in mind that if you should find that any witness has been deliberately falsifying on any one material point in his testimony, you are privileged to take that fact into consideration in determining whether he has falsified on other points.

Simply because you find that a witness has not repeated one fact to you accurately doesn't necessarily follow that he is wrong on every other point. A witness may be honestly mistaken as to one element of his testimony and be entirely accurate and correct on the other points. A witness may even be deliberately falsifying on one point, and yet be entirely truthful on all other points.

But if you find that a witness has deliberately lied on one material subject, it is only natural that you should be suspicious of his testimony on all subjects. And under those circumstances you are entitled to disbelieve his whole testimony. Whether you do believe it or disbelieve it, that is a matter for your own judgment.

Another question you may well ask yourselves in passing on the credibility of any witness is as to whether he has any bias or interest in the out-

come of the case; whether that bias or interest offer something of a temptation to shade his own testimony in accordance with his bias, or sway him, or to advance his own interest.

It may even be that his bias or interest has so operated on his mind that he has come to believe what he wants to believe and, therefore, he may testify falsely without, at the time, consciously realizing that his testimony is false.

The point is don't leave your common sense at home because you are sitting in a jury room or that you've heard this evidence in a courtroom. Apply those tests that you would apply in your own daily affairs to some story somebody is telling you and consider whether or not you regard it as true, as trustworthy; and, if so, to what extent.

Now, we have had, I think, in the case of one witness here, testimony that the witness was convicted of a felony. That was the testimony of Arlo Lewis.

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years.

Prior conviction doesn't render a witness

incompetent to testify, but it is merely a circumstance that you may consider in determining the credibility of the witness. It is your province to determine the weight to be given to any prior conviction which suggests to you that the credibility of the witness is open to question.

Now, there was testimony from law officers here. The testimony of a law enforcement officer is entitled to no special or exclusive sanctity merely because it comes from a law officer, an enforcement officer. A law enforcement officer who takes the stand subjects his testimony to the same examination and the same tests that any other witness does.

In the case of a law enforcement officer you should not believe him merely because he is a law enforcement officer. Recall his demeanor on the stand, his manner of testifying, the substance of his testimony. What was he talking about? Did he know? Did he have anything to do with it? And weigh and balance that testimony just as carefully as you would the testimony of any other witness.

Now, the defendant in this case didn't take the stand. The law does not compel a defendant in a criminal case to take the witness stand and testify.

No presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. As I told you before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So that's the law. He doesn't have to do it. And he doesn't have to take the risk that if he doesn't, the jury is going to infer something against him. That would be kind of an empty proposition to say he doesn't have to take the stand to testify, if at the same time the jury were allowed to draw an inference of guilt because he didn't. So you are not permitted to do that.

Now, ordinarily I wouldn't say anything about this at all, but the defendant has wanted me to explain that to you, and I have done it.

You heard the testimony of an accomplice, Arlo Lewis - at least he says that he was an accomplice - that he wilfully participated in the robbery of the bank and that he did so with the defendant Wayne Brown. And he had gone into some detail to explain how that happened.

Now, if you believe that Arlo Lewis robbed the bank in question, as he testified that he did,

and I would think there is no reason you shouldn't believe that; but if you do believe it, then he was an accomplice in that robbery. An accomplice of somebody, because there were two of them.

An accomplice is one who unites with another person in the commission of a crime voluntarily and with a common interest. But an accomplice doesn't become incompetent as a witness because of participation in the crime charged.

On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though it is not supported or corroborated by any other evidence - that is, by independent real evidence or testimonial evidence, evidence from exhibits, or testimony of other witnesses.

Of course, the Government claims here that there is other real evidence in the form of exhibits: clothes and the wrappers that were found at the place where the accomplice says they went to change clothes, and other things.

I'm not going to go through the whole case with you. I have already taken a lot of time in telling you what the law is. But just to indicate that there is a claim here that there is other

evidence that corroborates the testimony of Arlo Lewis.

The extent to which there has been such independent supporting evidence connecting the defendant with the crime charged is for you to determine. But you should keep in mind that the unsupported testimony of an accomplice is always to be regarded with caution and weighed with great care.

I think you can understand why. The argument was made here, and there is a basis for an argument, that if one is caught and knows that he can't get out of the case, he is going to be willing to testify for the Government in the hope of getting a better deal for himself. And the extent to which he may be getting a better deal for himself in this case has been brought out. He is going to be permitted to plead to a charge that carries a lesser penalty than the one which this charge that we are concerned with here today carries.

He has no assurance as to what the sentence is going to be, but at least he has the assurance that it is not going to be as great as it might be if he were still held on the original charge of robbing the bank, instead of just the new charge

of knowingly receiving money stolen from the bank.

But he is an accomplice, he is a witness, and he is entitled to the same consideration and to have his testimony measured in the same way as any other witness, and subjected to the same tests. You will take into account, among all those matters I suggested, any interest he might have in the verdict which you are being called upon to consider here today.

Now, one other point about Arlo Lewis. During the course of the trial the Government brought out that Arlo Lewis was testifying under a grant of use immunity. That doesn't mean he is immune from prosecution. All that means is that none of the admissions, the statements which he made when he testified, could be used in a prosecution against him. That is, if the deal were to be off tomorrow he could be prosecuted for this very offense. But you couldn't use that testimony against him. That's the immunity. He is immune from having those statements he made used against him.

As a matter of fact, it was brought out that the Government is going to prosecute him and that there are charges presently pending against him. But that testimony can't be used against him in

that prosecution.

So he hasn't been given immunity from prosecution. Rather, it was the Court who ordered simply that the Government can't use his testimony during this trial, nor during any prosecution of Mr. Lewis at a later date, in a prosecution against him. That is what that immunity was.

Now, one of the most important issues in this case - and I shall shortly be finished - is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity beyond a reasonable doubt.

It is not essential that the witness, himself, be free from doubt as to the correctness of his statement. There has been some testimony here about some things - that it looks like the gun, it looks the same as the gun. I'm just talking about the gun now rather than talking about the testimony that has been given with respect to witnesses who have looked at Wayne Brown here and been asked to identify him.

So I say it isn't necessary to prove that the witness was, himself or herself, free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied, beyond a reason-

able doubt, of the accuracy of the identification of the defendant before you may convict him.

Now a point, as I say, was brought out that there were no fingerprints of his there. So the argument is made he wasn't there. Some witnesses who were there were not able to identify him. So the argument is made that they couldn't identify me; it must have been someone else.

The Government contends, however, there is plenty of evidence that you were there. Not only Arlo Lewis points the finger at you and says you were there, that you pulled the gun, that you took the money, but they say there is other evidence to support the testimony of Arlo Lewis.

However, you, the jury, must be satisfied, beyond a reasonable doubt, of the accuracy of the identification; that is, satisfied beyond a reasonable doubt that it was Wayne Brown, this defendant who is in court here today, who participated in that robbery, before you may convict him.

If you are not convinced, beyond a reasonable doubt, that he is the person who committed the crime, you must find him not guilty.

So evidence to identify him as the person who was there may amount to an expression of belief or

impression by a witness who saw him. It may amount to circumstantial evidence. But whatever it is, whatever the evidence is, its value depends upon the degree to which you accept it and infer from it that it proves that it was Wayne Brown who was there.

I'm not sure whether any witness other than Arlo Lewis testified here that they recognize this defendant in the courtroom as the man who was in the bank that day. There may have been. I'm not sure about that.

You heard the evidence and you were paying closer attention, perhaps, than I was. But if there is testimony of that kind to be considered, then it is for you to judge whether the witness had the opportunity to observe, and did observe, and has an accurate recollection of what was observed.

No matter what a witness testifies to that's of any importance in the case, if it is testimony as to a fact that you are going to rely upon, you have to be satisfied as to the credibility of that witness and of the accuracy of the testimony.

All right. We're almost there. In fact, we are there. We are at the conclusion.

Neither directly nor indirectly have I tried to influence you to reach any particular conclusion as to any fact in this case, or as to the truthfulness of any witness, or as to the action, knowledge or intent of the defendant. It is your solemn duty, without fear or favor, without prejudice against either the defendant or the Government, to return a verdict that justly applies the law to the facts as you find them.

So you must reach your verdict solely on the evidence presented and under the instructions I have given you.

Now, the case is important, both to the Government and to the defendant. And you can see why. It is not for you, the jury, nor for the Court to appraise the wisdom or the propriety of the statute which is involved here. We have a law that was passed by the Congress and we are under obligation to abide by that law.

You, ladies and gentlemen of the jury, are duty bound as jurors to apply the law as you have been advised by the Court to the facts of the case as you find them to be.

So take this case with you to the jury room, determine the facts on the basis of the evidence

as it has been presented to you, apply the law as I have attempted to outline it to you, and then render a verdict fairly, uprightly and without a scintilla of prejudice either against the defendan or against the Government.

As soon as you go out we are going to cut one of you adrift from the others. Mr. Cohen, who is the surviving alternate, will not participate in the final deliberations toward a verdict. So he will be excused at this point.

But give us a few minutes and we will gather the exhibits and send them in to you. As soon as we do, then elect one of your group to act as your foreman while you conduct your deliberations.

When you have arrived at a verdict, knock on the door and the clerk will bring you into court so that you can announce it.

If I haven't told you before, I tell you now: The verdict must be unanimous.

You may now retire and start to consider your verdict.

(In the absence of the jury:)

THE COURT: Are there any objections to the Charge? Any reservations?

Does the Government have any?

MR. SMITH: None by the Government, your Honor.

THE COURT: None by the Government.

Anybody else?

MR. KENNEDY: I have no objections to the Charge, your Honor.

THE COURT: Okay.

(In the presence of the jury:)

THE COURT: You don't need to take your seats. Just stand there for a second. What I have to say won't take long. It will take just a second - guaranteed.

We are just waiting for Mr. Wayne Brown to be brought in, because he has a right to be present at all of the proceedings.

All right. It has been called to my attention, I call it a slip of the tongue, a mistake, anyway, in something I said to you in the course of the Charge.

I said when he was arrested in New York. There isn't any evidence, I guess, in the case that he was arrested. He was stopped and his baggage was examined and he was talked to.

So you will disregard and dismiss from your mind the statement that he was arrested in New York.

We have to have the record perfectly clear. Get back to work.

THE CLERK: Judge, one of the jurors just handed me a note.

THE COURT: A message already? Well, here is a note from a juror addressed:

"Dear Sir: Wife will be in courtroom about four-thirty or five p.m. waiting for me. Please advise her, Mrs. Rose Meligonis, to take the car home and I will get a ride from another juror to Westfarms Mall. Car is in the corner parking lot on Main Street, south of the main entrance. Thank you."

MR. DABROWSKI: Your Honor, there is a lady seated outside.

THE COURT: Do you want to talk to her and see what the situation is? See if she will accept that as an excuse.

(The jury was in deliberations from 4:35 p.m. to 4:45 p.m., when the above supplemental instruction by the Court was given; deliberations continued from 4:46 p.m. to 5:49 p.m., when the jury was excused for the day.)

(Deliberations continued at ten a.m., November 19, 1976, and concluded at 11:02, with a verdict of guilty.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE	:	
VS.	:	DOCKET NO. 77-1030
WAYNE BROWN, APPELLANT	:	

CERTIFICATION OF SERVICE

In accordance with Rule 25 (d) F.R.A.P., the appellant, Wayne Brown hereby certifies that on the 23rd day of February, 1977, a copy of the appellant' brief and appendix was hand delivered to Albert S. Dabrowski, Esq., Assistant U.S.Attorney, 450 Main Street, Hartford, Connecticut and that on said date eight copies of said brief and appendix were mailed, postage prepaid to the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, 10007.

Daniel H. Kennedy, Jr.

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